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(9)

(SHOW) PROCEEDINGS AND ORDERS DATE: 12/07

CASE NBR 83-1-01045 CFX
SHORT TITLE U.S. Dept. of Justice DOCKETED: Dec 23 198
VERSUS Provenzano, Anthony

Date	Proceedings and Orders
Dec 23 1983	Petition for writ of certiorari filed.
Jan 9 1984	Waiver of right of respondent Anthony Provenzano to respond filed.
Jan 11 1984	DISTRIBUTED. February 17, 1984
Jan 30 1984	Response requested.
Mar 2 1984	Brief of respondent Anthony Provenzano in opposition filed.
Mar 7 1984	REDISTRIBUTED. March 23, 1984
Mar 19 1984	Reply brief of petitioner U.S. Dept. of Justice, et al. filed.
Mar 26 1984	REDISTRIBUTED. March 30, 1984
Apr 2 1984	Petition GRANTED. The case is consolidated with 83-5878 and a total of one hour is allotted for oral argument.
May 10 1984	Order extending time to file brief of petitioner on the merits until June 16, 1984.

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(SHOW) PROCEEDINGS AND ORDERS DATE: 12/07

CASE NBR 83-1-01045 C X
SHORT TITLE U.S. Dept. of Justice DOCKETED: Dec 23 1983
VERSUS Provenzano, Anthony

Date	Proceedings and Orders
Jun 14 1984	Order further extending time to file brief of petitioners on the merits until June 30, 1984.
Jun 14 1984	Order extending time to file brief of respondent on the merits until August 20, 1984.
Jun 27 1984	Motion of respondent in No. 83-1045 and petitioners in No. 83-5878 for divided argument filed.
Jun 29 1984	Joint appendix filed.
Jul 6 1984	Brief of petitioners U.S. Dept. of Justice, et al. filed.
Jul 17 1984	Record filed.
Jul 29 1984	Record filed.
Aug 9 1984	Motion of respondent in No. 83-1045 and petitioners in No. 83-5878 for divided argument GRANTED.
Aug 20 1984	Brief amicus curiae of American Bar Association filed.
Aug 20 1984	Brief of respondent Anthony Provenzano filed.
Oct 29 1984	Motion of the Solicitor General to vacate filed.

CONTINUE (

SHOW)

PROCEEDINGS AND ORDERS

DATE: 120784

CASE NBR 83-1-01045 CFX
SHORT TITLE U.S. Dept. of Justice
VERSUS Provenzano, Anthony

DOCKETED: Dec 23 1983

Date	Proceedings and Orders
Oct 25 1984	Motion of petitioners Shapiro and Wentz for summary reversal of the judgment in No. 83-5878 filed.
Nov 3 1984	Motion of respondent Provenzano for summary affirmance of the judgment in No. 83-1045 filed.
Nov 5 1984	DISTRIBUTED. Nov. 9, 1984. (Motion of respondent for summary affirmance).
Nov 6 1984	Opposition of petitioners in No. 83-5878 to motion of the Solicitor General to vacate filed.
Nov 13 1984	DISTRIBUTED. November 21, 1984. (Motion of respondent ofr summary affirmance).
Nov 26 1984	Motion of respondent Provenzano for summary affirmance of the judgment in No. 83-1045 DENIED.
Nov 26 1984	Motion of petitioners Shapiro and Wentz for summary reversal of the judgment in No. 83-5878 DENIED. The judgments below are vacated, and the cases are remanded

CONTINUE (

PROCEEDINGS AND ORDERS

DATE: 120784

CASE NBR 83-1-01045 CFX
SHORT TITLE U.S. Dept. of Justice
VERSUS Provenzano, Anthony

DOCKETED: Dec 23 1983

Date	Proceedings and Orders
Nov 26 1984	Motion of petitioners Shapiro and Wentz for summary reversal of the judgment in No. 83-5878 DENIED. The judgments below are vacated, and the cases are remanded to the United States Court of Appeals for the Third and Seventh Circuits, respectively, for such further proceedings in conformity with the Per Curiam opinion filed this date. Dissenting statement in No. 83-1045 by Justice Stevens.

PETITION FOR WRIT OF CERTIORARI

83-1045

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION,
PETITIONERS

v.

ANTHONY PROVENZANO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

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Assistant to the Solicitor General

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Washington, D.C. 20530
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QUESTION PRESENTED

Whether Exemption (j)(2) of the Privacy Act, 5 U.S.C. 552a(j)(2), is a withholding statute within the scope of Exemption 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(3), and therefore prohibits an individual from obtaining disclosure of his agency records under the FOIA when access to those records is barred by the Privacy Act.

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In the Supreme Court of the United States

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No.

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

ANTHONY PROVENZANO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States Department of Justice, the Attorney General of the United States, and the Director of the Federal Bureau of Investigation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is reported at 717 F.2d 799. The opinion of the court of appeals in *Porter* v. *Department of Justice* (App., *infra*, 3a-26a), which was decided together with the instant case and portions of which were effectively incorporated by reference in the opinion in this case, is reported at 717 F.2d 787. The opinion on denial of rehearing (App., *infra*, 27a-30a) is not yet reported. The opinion of the district court (App., *infra*, 31a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1983, and a petition for rehearing was denied on November 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, and the Privacy Act of 1974, 5 U.S.C. 552a, are set forth in full at App., *infra*, 60a-85a.

STATEMENT

1. a. The Freedom of Information Act, 5 U.S.C. 552, which is a general disclosure statute pertaining to all executive agency records of the federal government, contains specific exemptions permitting withholding of certain agency records. These exemptions to disclosure are an integral part of the FOIA and represent "the congressional determination of the types of information that the Executive Branch must have the option to keep confidential * * *." *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). As this Court has recently observed, "[t]he [FOIA] expressly recognizes * * * that public disclosure is not always in the public interest and consequently provides that agency records may be withheld from disclosure under any one of the nine exemptions defined in 5 U.S.C. § 552(b)." *Baldrige* v. *Shapiro*, 445 U.S. 345, 352 (1982).

The primary FOIA exemption involved in this case is Exemption 3, 5 U.S.C. 552(b)(3). This exemption incorporates into the FOIA other statutes that provide for nondisclosure. Specifically, it exempts from the FOIA material covered by other statutes that either require nondisclosure absolutely or permit an agency not to disclose. In the latter instance, to qualify under Exemption 3, a statute must either define particular criteria

for withholding or set forth the particular types of matters to be withheld.[1]

The FOIA was enacted in 1966, and was first amended in 1974. At that time, Exemption 7, 5 U.S.C. 552(b)(7), dealing with investigatory records, was narrowed to permit greater disclosure. In 1976, the FOIA was again amended when the Government in the Sunshine Act, 5 U.S.C. 552b, was enacted. This amendment, among other things, altered the text of Exemption 3 to its current form.

b. The Privacy Act, 5 U.S.C. 552a, was enacted in 1974, shortly after the 1974 FOIA amendments. Among the Act's several purposes are preventing the release to third parties of agency information concerning individuals and permitting access by individuals to certain records concerning themselves. By its terms, the Privacy Act applies *only* to "records," which are agency files or documents about individuals contained within a "system of records," defined by the statute as a group of agency records from which information is retrieved through use of the name of an individual or some other personal identifier.[2] See 5 U.S.C. 552a(a)(4) and (5). Because of this limitation in the scope of the Privacy Act, the Act concerns only a portion of the material covered by the FOIA.

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[1] Exemption 3 reads in full:

> This section does not apply to matters that are—
>
> * * * * *
>
> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld[.]

[2] Thus, if an agency record on a subject is not indexed so that it can be found by use of an individual's name or other personal identifier, the record is not covered by the Privacy Act.

Section (b) of the Privacy Act, 5 U.S.C. 552a(b), precludes an agency from disclosing to any person any record (within a system of records) regarding an individual without the consent of the subject of the record. However, this section provides a number of exceptions to this general nondisclosure rule; one of these exceptions, contained in subsection (b)(2) (5 U.S.C. 552a(b)(2)), authorizes release of records if disclosure is required by the FOIA.

Section (d) of the Privacy Act, 5 U.S.C. 552a(d), provides the mechanism for access by individuals to records pertaining to themselves. This section, to use the terminology of the Privacy Act, establishes the method by which a person may obtain any government agency record that can be retrieved from a system of records by use of the individual's name or personal identifier. It also permits individuals to request that corrections be made to their records. See 5 U.S.C. 552a(d)(2). The Privacy Act provides an access system for first party requests only.[3]

The scope of an individual's right of access to his own records may be limited by agencies through exemptions found in Sections (j) and (k) of the Privacy Act. Exemption (j), 5 U.S.C. 552a(j), permits the heads of certain agencies maintaining systems of records to promulgate rules exempting entire systems of records from access. Thus, if a request is made for a record within an exempted system of records, the record may be withheld without further inquiry. Because of this feature, Privacy Act Exemption (j) is quite different from the FOIA exemptions, which generally require an agency to comb each requested document and to delete only the exact

[3] A request by an individual for his own records is commonly referred to as a "first party request." A request by an individual for another person's records is known as a "third party request." We will use this terminology throughout this petition.

data exempted from disclosure by a specific FOIA exemption.

Privacy Act Exemption (j)(2), 5 U.S.C. 552a(j)(2), provides an exemption for criminal enforcement records kept in a system of records by agencies whose principal function pertains to enforcement of criminal laws. Though not as broad as Exemption (j), Exemption (k) provides exemptions for other records, such as law enforcement investigatory records that are not covered by Exemption (j)(2), classified documents, and employment testing and personnel information. See 5 U.S.C. 552a(k) (1) through (7).

In addition to providing exemptions from access, the Privacy Act exemptions permit agencies to avoid other specified portions of the Act, including provisions requiring an agency to make an accounting to the individual named in a particular record of disclosures of that record to others (5 U.S.C. 552a(c)(3)), and to give notice regarding agency record collection practices and procedures for gaining access to agency records (5 U.S.C. 552a(e)(1), (e)(4)(G) and (H)).

c. The controversy here centers on the relationship between the FOIA, the general statute governing disclosure of all government records, and the Privacy Act, the specific statute covering release of files retrieved through use of an individual's name. If the Privacy Act is a FOIA Exemption 3 statute, its access exemptions are in essence incorporated into the FOIA. As a result, if an individual requester is precluded from access to his own records under the Privacy Act, he also would be precluded from access to those records under the FOIA. In such instances, an agency need only follow the streamlined Privacy Act procedures to determine if the requested records are contained in an exempt system of records.

If, on the other hand, the Privacy Act is not a statute falling within FOIA Exemption 3, a requester could obtain any nonexempt documents under the FOIA, re-

gardless of the Privacy Act. Thus, even if records are excluded from access under the Privacy Act, a requester could avoid this prohibition and attempt to obtain the material simply by invoking the FOIA instead.

2. Respondent Anthony Provenzano is a former officer of Local 560 of the International Brotherhood of Teamsters in New Jersey. During the past 20 years, respondent has been convicted in state courts of murder and extortion, and in federal courts of conspiracy and substantive violations of the Racketeer Influenced and Corrupt Organization Act (18 U.S.C. 1962), and conspiracy to pay a kickback to a union pension fund trustee in order to obtain favors on a loan proposal (18 U.S.C. 371 and 1954). See *United States* v. *Provenzano*, 620 F.2d 985 (3d Cir.), cert. denied, 449 U.S. 899 (1980); *United States* v. *Provenzano*, 615 F.2d 37 (2d Cir.), cert. denied, 446 U.S. 963 (1980); *United States* v. *Provenzano*, 334 F.2d 678 (3d Cir.), cert. denied, 379 U.S. 947 (1964); *People* v. *Provenzano*, 79 A.D.2d 811, 435 N.Y.S.2d 369 (1980).

a. In April 1978, respondent sent requests to the Department of Justice and the Federal Bureau of Investigation for all files and documents indexed under his name, or containing his name (App., *infra*, 32a). Following further correspondence, the FBI notified respondent, in July 1978, that it had located documents covered by his request and would process the request as soon as possible (C.A. App. 41a).[4]

In July 1980, respondent filed an administrative appeal, challenging the failure by the Criminal Division of the Department of Justice to respond substantively to his request. The Department's Office of Privacy and Information Appeals advised respondent that his request was 76th on the Criminal Division project list, and that it would be some time before the request could be proc-

[4] "C.A. App." refers to the appendix in the court of appeals.

essed (App., *infra*, 33a). The Department indicated that if he so chose, respondent could treat this response as a denial of his administrative appeal (C.A. App. 17a).

b. Approximately 17 months later, in December 1981, respondent filed this action in the United States District Court for the District of New Jersey against the Department of Justice and the FBI, seeking an order requiring release of the requested documents under the FOIA.

The government moved for summary judgment, supported by affidavits from Criminal Division and FBI personnel. The affidavits showed that the Criminal Division had searched its files and found records within the scope of respondent's request in eight Department of Justice file systems (App., *infra*, 34a). The Criminal Division affidavit stated (*id.* at 34a-35a) that all of these records systems were by regulation exempt from access under the Privacy Act. See 28 C.F.R. 16.91. The FBI affidavit stated that the index to the Bureau's Central Records System revealed that respondent had been the subject of a number of FBI investigations (App., *infra*, 34a). The FBI reported (*id.* at 35a) that its records pertaining to respondent had also been exempted by regulation from access under the Privacy Act. See 28 C.F.R. 16.96. The government contended that, because the relevant records were exempt from disclosure under the Privacy Act, they also were exempt from disclosure under the FOIA.

c. The district court granted the government's motion for summary judgment (App., *infra*, 31a-41a). Noting that the Criminal Division and FBI affidavits indicated that all of the records sought by respondent were contained in systems of records exempted from access by Privacy Act Exemption (j)(2), the court concluded that Exemption (j)(2) is a withholding statute within the meaning of FOIA Exemption 3, and that the government had therefore properly declined to release

the documents requested by respondent. The court observed that the Fifth Circuit had reached a similar conclusion, with respect to another Privacy Act exemption, in *Painter* v. *FBI*, 615 F.2d 689 (1980) (App., *infra*, 39a). Although the court was aware that the District of Columbia Circuit had rejected this view in *Greentree* v. *U.S. Customs Service*, 674 F.2d 74 (1982), it disagreed with the analysis in *Greentree* (App., *infra*, 39a).

3. a. The court of appeals reversed (App., *infra*, 1a-2a), relying on its opinion in the companion case of *Porter* v. *U.S. Department of Justice*, 717 F.2d 787 (1983) (App., *infra*, 3a-26a).[5] Initially, the court noted that there is disagreement among the circuits regarding the relationship between the FOIA and the Privacy Act (App., *infra*, 19a-20a). The court explained that the D.C. Circuit, in *Greentree* v. *U.S. Customs Service*, *supra*, had held that a requester may use the FOIA to avoid the Privacy Act access exemptions, and that this position contradicted that taken by the Fifth Circuit in *Painter* v. *FBI*, *supra*, and by the Seventh Circuit in *Terkel* v. *Kelly*, 599 F.2d 214 (1979), cert. denied, 444 U.S. 1013 (1980). The court of appeals found the *Green-*

[5] This case was consolidated with *Porter* in the court of appeals for the purpose of oral argument. In *Porter*, the court first held that no first party request had been made, thereby rendering the Privacy Act exemptions inapplicable (App., *infra*, 13a-19a). In dictum, the court then discussed the Privacy Act (App., *infra*, 19a-26a), and it is this part of the *Porter* opinion to which the court referred in its brief *per curiam* opinion in this case. Although we disagree with the court's conclusion in *Porter* that no first party request is involved, we do not believe that this issue warrants further review. Accordingly, the government has decided to litigate *Porter* in the district court with regard to the specific FOIA exemptions implicated in that case. In describing the court of appeals' ruling in this case, the references in the text are actually to the Privacy Act/FOIA discussion in the *Porter* opinion, which we have set forth in the Appendix, *infra*, 3a-26a.

tree reasoning persuasive and adopted it (App., *infra*, 20a). (In *Greentree*, the D.C. Circuit had held that subsection (b)(2) of the Privacy Act, which provides an exception to the general rule against disclosure in Section (b) of that Act when the FOIA mandates disclosure, "represents a Congressional mandate that the Privacy Act *not* be used as a barrier to FOIA access" (674 F.2d at 79) (emphasis in original).)

The court of appeals then added several of its own observations. It noted that the Privacy Act's access exemptions state that they exempt agencies from the requirements of "this section," and it therefore concluded that the Privacy Act was not meant to have any effect on the FOIA (App., *infra*, 21a). The court thus found it unnecessary to analyze the Privacy Act in relation to the criteria of FOIA Exemption 3 (App., *infra*, 21a n.11). The court of appeals further determined that there is nothing in the Privacy Act that could be read as supporting an express or implied repeal of the FOIA (*id.* at 21a-22a). Although it did note a "certain amount of ambiguity" in the legislative history of the Privacy Act (*id.* at 22a), the court nonetheless concluded that this history revealed that Congress intended to keep the Privacy Act and FOIA exemptions separate from each other (*id.* at 24a). Accordingly, the court of appeals reversed the district court's judgment and remanded the case to that court for further proceedings (presumably, for the agency to process the requested documents under the FOIA).

b. The government filed a petition for rehearing with a suggestion that the case be heard en banc. The court, by a 6-4 vote, denied the petition without an opinion (App., *infra*, 27a-28a). In dissent, three judges expressed the view that "[a]lthough one of the goals of the Privacy Act is to make material available to first party requesters, a persuasive argument may be made that Exemption Three of the Freedom of Information Act

(FOIA) authorizes the government to deny [respondent's] request" (App., *infra*, 29a). These dissenting judges would have granted rehearing because they found that there is a "square conflict" among the circuits and "this matter is of considerable importance to the administration of criminal justice" (*ibid.*).

4. Shortly after rehearing was denied in this case, the Seventh Circuit, in *Shapiro* v. *DEA*, No. 82-2818 (Nov. 16, 1983), petition for cert. pending, No. 83-5878, expressly disagreed with the D.C. Circuit's decision in *Greentree* and the court of appeals' decision in this case, and ruled that Privacy Act Exemption (j)(2) is a FOIA Exemption 3 statute.[6]

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the interrelationship of the two principal statutes governing access to government records. The question is now the subject of an acknowledged conflict among four courts of appeals. Moreover, the decision below is wrong because it is contrary to the plain wording of the Privacy Act, it disregards congressional intent, and it ignores the critical FOIA exemption at issue here.

The particular case before the Court is important because it involves a request for thousands of pages of criminal law enforcement documents that are exempt from disclosure under the Privacy Act.[7] If, despite the Privacy Act exemption, the processing of these documents is nevertheless required under the FOIA, this would necessitate the expenditure of massive resources by both the Criminal Division and the FBI. Thus, resolution of the question presented will make a great difference in the way the particular FOIA request at issue is treated. Of course, apart from its impact on this case, the issue here "is of considerable importance to the administration of criminal justice" generally (App., *infra*, 29a) (Adams, J., dissenting from the denial of rehearing), because it will determine how government agencies with criminal justice responsibilities must process the thousands of first party requests they receive each year. Furthermore, under the court of appeals' ruling, law enforcement records that Congress expressly authorized to be withheld under the Privacy Act would nevertheless have to be released under the FOIA if no FOIA exemption were available to bar disclosure. Accordingly, we submit that this case warrants plenary review by this Court.

1. There is an acknowledged, serious conflict among the courts of appeals on the question of the proper relationship between the Privacy Act and the FOIA. Both the D.C. Circuit, in *Greentree* v. *U.S. Customs Service*, *supra*, and the Third Circuit here have held that the Privacy Act and the FOIA must be considered completely independent of each other, so that material exempt from access under the former may nonetheless be sought under the latter.

By contrast, in *Painter* v. *FBI*, *supra*, the Fifth Circuit observed that "Congress was clearly aware that these various open records acts overlapped in places" (615 F.2d at 690). The court noted *(ibid.)* that when Congress did not intend the exemptions in one act to affect disclosure under the other, it specifically so provided. See 5 U.S.C. 552a(q). Because Congress did not exclude FOIA-authorized releases from the Privacy Act's first party disclosure prohibitions in Exemptions (j) and (k), and because these exemptions come within the plain wording of FOIA Exemption 3, the Fifth Circuit concluded that "material exempted from disclosure under the provisions of the Privacy Act are matters 'specifically exempted from disclosure by statute' under [FOIA Exemption 3]." 615 F.2d at 691 n.3.

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[6] Because this opinion is not yet published, we have reprinted it in the Appendix, *infra*, 42a-58a.

[7] The request here involves approximately 43,000 pages of Criminal Division records and more than 13,000 pages of FBI records.

Most recently, the Seventh Circuit has ruled, in a case nearly identical to this one, that Privacy Act Exemption (j)(2) is a withholding statute within the meaning of FOIA Exemption 3. *Shapiro* v. *DEA*, *supra*.[8] The Seventh Circuit found that the wording of Privacy Act Exemption (j)(2) meets the criteria of FOIA Exemption 3 and that the legislative history of the Privacy Act shows that Congress intended the Privacy Act access exemptions to be broader than the FOIA exemptions; the court concluded that its ruling would give full meaning to both acts.[9]

It is important that this Court resolve this conflict because it concerns the method by which various criminal justice agencies such as the FBI, Drug Enforcement Administration, Criminal Division, Customs Service, and Secret Service respond to the thousands of requests filed each year by individuals seeking their own agency records.[10] If Privacy Act Exemption (j)(2) is a FOIA Exemption 3 statute, such requests may be processed expeditiously because the criminal investigatory records sought will usually be exempt under agency regulations promulgated pursuant to Exemption (j)(2). If Exemption (j)(2) is not such a statute, a far

[8] In so ruling, the Seventh Circuit reaffirmed its earlier conclusion that "the two statutes must be read together, and that the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt." *Terkel* v. *Kelly*, 599 F.2d at 216.

[9] In addition, a number of district courts have held either that the Privacy Act is an Exemption 3 statute under the FOIA, or that the FOIA should not be read to make the Privacy Act exemptions meaningless. See *Anderson* v. *Huff*, No. 3-82-52 (D. Minn. June 8, 1982); *Heinzl* v. *INS*, No. C-80-1210 (N.D. Cal. Dec. 18, 1981); *Rachel* v. *Department of Justice*, No. 83-C-0434 (N.D. Ill. Aug. 1, 1983); *Turner* v. *Ralston*, 567 F. Supp. 606 (W.D. Mo. 1983); *Martin* v. *FBI*, No. 83-C-123 (N.D. Ill. Sept. 30, 1983).

[10] In 1982, the FBI received 10,623 first party disclosure requests. (This figure includes 1,105 reopened requests.) The Criminal Division and the DEA received 709 and 1,184 such requests in that period. See U.S. Department of Justice, *Freedom of Information Act Annual Report 1982*, at 18 (June 28, 1983).

more difficult and time consuming process would be necessary because then the agency ordinarily would have to examine each document line-by-line to determine if specific FOIA exemptions apply in addition to Privacy Act Exemption (j)(2). And if no FOIA exemption were available, law enforcement records that Congress authorized to be withheld from disclosure under the Privacy Act would have to be released under the FOIA.

2. The decision below is contrary to the plain language of the Privacy Act, fails to give full effect to the clearly expressed intent of Congress, and unjustifiably disregards the FOIA exemption at issue.

a. The court of appeals, like the D.C. Circuit in *Greentree*, believed that the issue raised in this case could be resolved simply by reference to subsection (b)(2) of the Privacy Act, 5 U.S.C. 552a(b)(2), which provides that an agency may release a record about an individual when disclosure of the record would be required by the FOIA (App., *infra*, 21a). While this conclusion may perhaps have surface appeal, it cannot withstand analysis because it is directly contrary to the plain wording and structure of the Privacy Act.

As previously noted, Section (b) of the Privacy Act states a general rule that an agency may not release records about an individual, and it then lists 12 exceptions to that general rule. Subsection (b)(2), upon which the court of appeals relied, is one of those exceptions. However, what the court inexplicably ignored (as did the D.C. Circuit in *Greentree*) is that the opening language in Section (b) states that the general nondisclosure rule of the section does not apply when an individual requests his own record or consents to release of his record. See 5 U.S.C. 552a(b).[11] This language clearly

[11] The opening portion of Section (b) states in pertinent part:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, *except pursuant to a written request by, or with the prior written consent of, the indi-*

shows that the exception contained in subsection (b)(2) does not come into play when an individual requests his own file because the introductory language of Section (b) preempts reference to the 12 exceptions listed. See *Shapiro* v. *DEA*, slip op. 9-10, 12-13. (App., *infra*, 50a-51a, 53a-54a).

In light of this unambiguous language in the opening part of Section (b), it is difficult to understand the court of appeals' statement (App., *infra*, 21a) that subsection (b)(2) was intended to apply to both third party and first party requests.[12] We submit that the court plainly erred in concluding that subsection (b)(2) governs here since the exception in that subsection has no relevance to a first party request such as that made by respondent. First party requests instead are governed by Section (d), which contains no provision comparable to subsection (b)(2) and is expressly limited by the exemptions authorized in Sections (j) and (k).

b. The legislative history of the Privacy Act reveals a clear intent by Congress to empower certain agencies to protect their "highly sensitive and usually confidential information collected by law enforcement officers in anticipation of criminal activity." S. Rep. 93-1183, 93d Cong., 2d Sess. 23 (1974). In reviewing the section in

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vidual to whom the record pertains, unless disclosure of the record would be [permissible under one of the 12 exceptions].

5 U.S.C. 552a(b)(emphasis added).

[12] Moreover, the history of subsection (b)(2) supports the plain language of the statute and reveals that this subsection was specifically designed to accommodate third party requests. See S. Rep. 93-1183, 93d Cong., 2d Sess. 71 (1974), indicating that an earlier version of subsection (b)(2) was included in the privacy legislation "to meet the objections of press and media representatives that the statutory right of access to public records and the right to disclosure of government information might be defeated if such restrictions were to be placed on the public and press."

the House version of the privacy legislation that contained an exception from disclosure for CIA and criminal justice records, the House Government Operations Committee concluded that "such a broad exemption is permissible for these two types of records because they contain particularly sensitive information." H.R. Rep. 93-1416, 93d Cong., 2d Sess. 18-20 (1974). The congressional debates on the privacy legislation confirm that Congress plainly intended to grant federal criminal justice agencies the authority necessary to protect their records fully. See, *e.g.*, 120 Cong. Rec. 36644 (1974) (remarks of Rep. Moorhead); *id.* at 36650-36651, 36962 (Rep. Ichord); *id.* at 36656 (Rep. Holifield); *id.* at 36911 (Sen. Ervin).

In addition, the fact that Congress intended the Privacy Act to provide broader protection for sensitive records than the FOIA is demonstrated by Congress's rejection of a provision in the Senate version of the privacy legislation that would have made the Privacy Act's law enforcement records exemption coextensive with that of the FOIA. The Senate bill initially contained a broad exemption for law enforcement investigative and intelligence files. See Section 203(b) of S. 3418 (93d Cong., 2d Sess. (1974)). On the Senate floor, this original language was replaced with narrower language substantially similar to the current FOIA Exemption 7, 5 U.S.C. 552(b)(7). Ultimately, however, Congress rejected this limited Senate language in favor of the broader law enforcement records exemption now in the Privacy Act. See 5 U.S.C. 552a(j)(2) and (k)(2).

c. Not only did the court of appeals ignore the plain language of Section (b) and the history of the Privacy Act, it also disregarded Exemption 3 of the FOIA. Contrary to the court's belief that Exemption 3 is irrelevant, we submit that the very heart of this case is whether Privacy Act Exemption (j)(2) satisfies the criteria set out in Exemption 3.

The court of appeals focused its attention on whether the Privacy Act repealed the FOIA (App., *infra*, 21a-24a). Exemption 3 of the FOIA makes that inquiry unnecessary, however, because it specifically incorporates into the FOIA other statutes that provide for nondisclosure. The "repeal" analysis used by the court here would require that, whenever an agency asserts that a nondisclosure statute fits within Exemption 3, it must point to statutory language or legislative history showing that Congress intended the statute to repeal the FOIA. Yet, in the numerous cases examining the application of Exemption 3, we are not aware of a single instance in which another court has imposed such a requirement.

The court of appeals also attempted to avoid reference to FOIA Exemption 3 by pointing to language in Privacy Act Exemption (j) stating that the exemption authorizes specified agencies to overcome certain requirements "of this section," *i.e.*, the Privacy Act. See 5 U.S.C. 552a(j). The court therefore concluded that Congress meant the Privacy Act exemptions to govern access only pursuant to the Privacy Act (App., *infra*, 21a).

Put simply, "[i]n terms of the statutory objectives, this distinction makes little sense." *FBI* v. *Abramson*, 456 U.S. 615, 628 (1982) (footnote omitted). It means that Congress devoted considerable attention to providing Privacy Act exemptions that are broader than the FOIA exemptions, but nonetheless intended that persons could render those Privacy Act exemptions meaningless simply by resorting to the FOIA. Thus, under the court of appeals' approach, one would be forced to conclude that Congress meant to create Privacy Act access exemptions knowing full well that a requester could evade them by filing a request under the FOIA for the same material, even though its release was barred under the Privacy Act.

In order to avoid attributing this bizarre result to Congress, the Privacy Act exemptions must be examined with reference to FOIA Exemption 3. Moreover, a simple reading of Exemption (j)(2) makes clear that it comes within Exemption 3 because it states in detail the particular types of matters that the relevant agencies have the discretion to withhold. See *Shapiro* v. *DEA*, slip op. 8 (App., *infra*, 49a); *Painter* v. *FBI*, 615 F.2d at 691 n.3[12]

d. Furthermore, the decision below is contrary to settled principles of statutory construction because it fails to interpret the Privacy Act and the FOIA in such a way that the exemptions in each have meaning. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). If Privacy Act Exemption (j)(2) is a FOIA Exemption 3 statute, no part of either statute is rendered meaningless. The Privacy Act exemptions would cover only first party requests for materials that constitute Privacy Act "records," while the FOIA exemptions would continue to govern exclusively all third party requests and all requests for non-Privacy Act material. Under the court of appeals' view, however, the Privacy Act access exemptions would have no effect beyond the scope of the FOIA exemptions. See *Shapiro* v. *DEA*, slip op. 11, 17 (App., *infra*, 52a, 58a). This is plainly not what Con-

---

[12] We argued in the court of appeals that, even if Privacy Act Exemption (j)(2) is not a FOIA Exemption 3 statute, the FOIA should not be used to override the clear provisions of the Privacy Act. The court of appeals did not specifically address this point and, accordingly, we have not presented it as a separate question warranting plenary review. It should be noted, however, that the Privacy Act establishes a self-contained statutory scheme, more specific than the FOIA, governing access to certain types of agency records. Therefore, we submit that the Privacy Act should be given its full effect regardless of the FOIA. Cf. *King* v. *IRS*, 688 F.2d 488, 495-496 (7th Cir. 1982); *White* v. *IRS*, 707 F.2d 897, 900 (6th Cir. 1983); *Zale Corp.* v. *IRS*, 481 F. Supp. 486, 489 (D. D.C. 1979).

gress intended, as shown by the fact that it devoted considerable attention to fashioning the Privacy Act exemptions, which it made broader than the FOIA exemptions.

The court of appeals appears to have overlooked this crucial point. The court expressed the view that its interpretation of the FOIA and the Privacy Act made the two acts "perfectly reconcilable" (App., *infra*, 22a). As noted above, however, the court's holding leaves the Privacy Act exemptions devoid of any purpose with regard to access.[14] Thus, it is only by effectively repealing a substantial element of the Privacy Act that the court managed to render the two acts "perfectly reconcilable."

e. In *Greentree* v. *U.S. Customs Service*, *supra* (which was relied upon by the court of appeals here), the D.C. Circuit based its ruling in large measure on a theory labeled the "third party anomaly." See 674 F.2d at 79-80. This theory begins with the premise that access under the FOIA is greater than under the Privacy Act. An individual making a *first party* request for a document will be denied access if the Privacy Act access exemptions provide for withholding and they trigger FOIA Exemption 3. However, a *third party* request under the FOIA for the same document could

[14] It is true that Exemption (j)(2) exempts agencies from requirements of the Privacy Act other than those governing access. See 5 U.S.C. 552a(j). However, Exemption (j) contains a detailed list of the specific provisions of the Privacy Act that it covers, and one of those is the provision regarding access. In addition, as the legislative history of the Privacy Act makes clear, Congress intended to provide criminal justice agencies with the means to prevent access to their sensitive files. Therefore, to say that Exemption (j) is left with some meaning for Privacy Act functions other than those dealing with access is no answer to the point that the decision here renders meaningless a central aspect of the Privacy Act. See *Shapiro* v. *DEA*, slip op. 13-14 (App., *infra*, 54a-55a).

conceivably be granted because Privacy Act Exemptions (j) and (k) have no effect on Section (b) of that Act, and thus are irrelevant to third party requests. See also 5 U.S.C. 552a(b)(2).

Although a "third party anomaly" might indeed exist, it is clear that the anomaly can arise only in rare instances. In the vast majority of cases, a third party would be prevented from obtaining access to records about another individual covered by the Privacy Act (particularly if they are law enforcement records) because of the FOIA's own privacy exemptions (5 U.S.C. 552(b)(6) and (7)(C)), or other FOIA exemptions. Under the balancing test used to implement these exemptions, such an invasion of privacy is permitted only in those cases in which the interest in preserving privacy is outweighed by a strong countervailing public interest in disclosure. See *Department of State* v. *Washington Post Co.*, 456 U.S. 595 (1982); *Department of Air Force* v. *Rose*, 425 U.S. 352, 370-376 (1976).

Furthermore, the reliance placed on the third party anomaly theory by the court in *Greentree* is unjustified because the crucial question is not whether such an anomaly might exist today, but whether it sheds any light on the intent of Congress in enacting the Privacy Act. See *Shapiro* v. *DEA*, slip op. 16 (App., *infra*, 57a). We have found no evidence that Congress was aware that such an anomaly could arise. The third party anomaly theory therefore shows nothing about congressional intent, which is the crux of the inquiry here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5681

PROVENZANO, ANTHONY,
Appellant

v.

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM FRENCH SMITH, Attorney General of the United States, and WILLIAM H. WEBSTER, Director of the Federal Bureau of Investigation

(D. C. Civil No. 81-3767)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY — NEWARK

Argued: August 4, 1983

Before GIBBONS and HUNTER, *Circuit Judges*
and MANSMANN,* *District Judge*

(Opinion filed September 15, 1983)

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* Hon. Carol Los Mansmann, United States District Judge for the Western District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

PER CURIAM:

In April of 1978 Anthony Provenzano submitted a Freedom of Information Act request to the Department of Justice for all documents indexed under or containing his name. In July of 1980 he appealed to the Attorney General from the failure of the Criminal Division to respond to his request, and was informed that since it would take 25 months before the request could be processed, he could regard his appeal as denied, and bring action in an appropriate federal court.

In December 1981 Provenzano filed the instant action. The government moved for summary judgment, filing in support thereof affidavits of Douglas S. Wood and James C. Felix, which established that the requested records were in a system of records exempted by agency action pursuant to 5 U.S.C. §552a(j)(2) (1982). The trial court, relying on *Painter* v. *Federal Bureau of Investigation*, 615 F.2d 689 (5th Cir. 1980), and rejecting the authority of *Greentree* v. *United States Customs Service*, 674 F.2d 74 (D.C. Cir. 1982), granted summary judgment, and Provenzano appealed.

In *Porter* v. *Department of Justice*, No. 82-1833, filed simultaneously herewith, we hold that the Privacy Act did not *pro tanto* repeal the Freedom of Information Act insofar as the latter provides access for requesters to information about themselves. That holding requires that the summary judgment in this case be reversed.

The judgment appealed from will be reversed and the case remanded for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1833

PORTER, JUDITH R. and
PORTER, GERALD J.,

Appellants

v.

UNITED STATES DEPARTMENT OF JUSTICE

(D. C. Civil No. 82-2068)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued: August 4, 1983

Before: GIBBONS and HUNTER, *Circuit Judges*,
and MANSMANN,* *District Judge*

(Opinion filed September 15, 1983)

---

* Hon. Carol Los Mansmann, United States District Judge for the Western District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

GIBBONS, *Circuit Judge*:

Judith R. Porter and Gerald J. Porter of Ardmore, Pennsylvania, appeal from a summary judgment in favor of the Department of Justice in their suit under the Freedom of Information Act, 5 U.S.C. §552 (1982), to compel disclosure of information about them in the files of the Federal Bureau of Investigation. The trial court granted summary judgment on two grounds: that the Privacy Act, 5 U.S.C. §552a (1982), is a nondisclosure statute within the meaning of the Freedom of Information Act; and that in any event the material sought is exempt from disclosure under the Freedom of Information Act. We reverse, and remand for further proceedings.

I.

In March of 1981 Mr. Porter wrote to the FBI Freedom of Information Act Director requesting copies of any files kept on him or his wife. The letter indicated that it was his understanding that the FBI investigated them in 1972. On May 11, 1981, the Chief of the FBI Records Management Division informed them that the central records system at FBI Headquarters in Washington revealed no information indicating that they had ever been subject to investigation by the Bureau. The request was forwarded to the Bureau's Philadelphia Office. On June 4, 1981, that office informed the Porters that a "main" file concerning Judith R. Porter had been located, and that this file contained a reference to Gerald.

The file was referred to FBI Headquarters, which on June 18, 1981, informed the Porters that Judith R. Porter was the subject of a limited security investigation, initiated to determine if any activity on her part constituted a risk to national security. They were also informed that the investigation was closed after it was determined that no such risk existed, and that the file contained a reference to Gerald. Finally, they were told that the file consisted of five pages, all of which was classified pursu-

ant to the national defense and foreign policy exemption to the Freedom of Information Act.[1]

The Porters filed an administrative appeal to the Office of Privacy and Information Appeals of the Department of Justice, pointing out that it was a total mystery to them what activity they had engaged in could have prompted an investigation of their risk to national security. They requested that if their appeal be denied, the government inform them:

> 1. On what date was the investigation of Judith R. Porter begun and when was it concluded;
>
> 2. What activity or activities of Judith R. Porter prompted the investigation;
>
> 3. Do the five pages of classified information contain letters written by Judith R. Porter, transcripts of public statements made by Judith R. Porter, or newspaper reports of her activities;
>
> 4. Do the references to Gerald J. Porter pertain to activities in which he engaged or are they simply a mention of the fact that he is the spouse of Judith R. Porter; and
>
> 5. At what future date is it anticipated that the file will be declassified?

On September 30, 1981, the Activity Director of the Office of Privacy and Information appeals ruled:

> After careful consideration of your appeal, I have decided to affirm the initial action in this case. The material pertaining to you is classified and I am affirming the denial of access to it on the basis of 5 U.S.C.[§] 552(b)(1). This material, along with a copy of your appeal letter, is being referred to the

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1. 5 U.S.C. §552(b)(1) provides:

> This section does not apply to matters that are — (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order; . . . .

> Department Review Committee to determine whether it warrants continued classification under Executive Order 12065. You will be notified of the Committee's final decision results in the declassification of any information. . . .

The September 30, 1981 letter advised the Porters of their right to seek judicial review of the ruling, and on June 18, 1982 they filed their complaint in this action.

In answer to the complaint the Department of Justice contended for the first time that the Freedom of Information Act did not afford the Porters a remedy, but that the Privacy Act of 1974, 5 U.S.C. §552a (1982), is their exclusive remedy. The Department contended, as well, that under the Privacy Act the materials sought were exempt from disclosure. Moreover, according to the Justice Department, even if the Freedom of Information Act were to apply to the Porters, the materials would be exempt under 5 U.S.C. §552(b)(3) (1982), which provides that the Act does not apply to matters

> (3) specifically exempted from disclosure by statute . . ., provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; . . . .

According to the Justice Department, section (j)(2) of the Privacy Act, 5 U.S.C. §552a(j)(2) (1982), is such an exemption statute.

The Porters served interrogatories seeking to learn the basis for the Justice Department's claim of exemption. These the Department refused to answer. Instead it moved for a protective order on which the trial court never ruled. While the motion was pending the Department moved for summary judgment, relying on the affidavit of Special Agent Douglass Ogden. This affidavit was served on the Porters.

The Ogden affidavit recounted the administrative history of Porter's information request and described

generally the manner in which the five page file was retrieved. As to the file's contents, Ogden stated:

> One FBIHQ "main" file containing the results of the Philadelphia FBI investigation was located wherein Judith R. Porter was the subject. This file reflected a preliminary investigation initiated to determine if a specific activity of Judith R. Porter constituted a risk to national security. The investigation was predicated upon possible violations of Federal law, including, but not limited to, Title 18, U.S.C., Sections 792 *et seq.* (Espionage); 2152 *et seq.* (Sabotage); Title 22, U.S.C., Section 611 *et seq.* (Foreign Agent Registration Act); and Title 50, U.S.C., Section 401 *et seq.* (National Security Act of 1947). The investigation was closed after it was determined that no violation of Federal law had occurred and that Judith R. Porter constituted no risk to the national security.

Ogden also stated that the requested records were maintained in the Bureau's Central Record System which has by regulation been exempted from access pursuant to exemption (j)(2) of the Privacy Act, 5 U.S.C. §552a(j)(2) (1982). He stated further that the file fell within Freedom of Information Act exemption 1, covering national defense and foreign policy materials. Finally, Ogden noted that after the lawsuit began the Bureau had reviewed the file and declassified "a small amount of material." The declassified material was not revealed, however, because in the Department's view the entire file, even though partly declassified, was still covered by Privacy Act exemption (j)(2).

The Porters attempted to depose Agent Ogden, but the Department moved for a protective order, which on October 13, 1982, the trial court granted, pending its *in camera* inspection of the file.

Following the court's order staying Ogden's deposition and ordering the Department to provide the file for its inspection, the Department furnished the court, *ex parte*, with two affidavits of Robert Peterson, a Special

Agent in the FBI National Security Affidavits Unit. The Department explained that the first Peterson affidavit, dated September 23, 1982, was intended to serve as a public *Vaughn* index in compliance with *Ferri v. Bell*, 645 F.2d 1213, 1220 (3d Cir. 1981), *modified on other grounds*, 671 F.2d 769 (3d Cir. 1982), and *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), but was being withheld from the Porters to avoid the contention that furnishing an affidavit required by the Freedom of Information Act was a waiver of the claimed exemption under the Privacy Act. Since it was relying on the Privacy Act, the Department insisted it had no obligation to furnish a *Vaughn* index.[2] The second Peterson affidavit, dated October 20, 1982, was furnished to assist the Court in its examination of the five page file, which was furnished simultaneously. The second affidavit is not in the record and its contents have not been disclosed.

Peterson's September 23, 1982 affidavit contends that the documents in the file were properly classified under Executive Order 12356 which went into effect in August 1982, because (1) they concerned intelligence activities, sources, or methods, and foreign relations of the United States; and (2) their disclosure could be expected to cause damage to the national security. Peterson segregated out minor portions of the documents that could be declassified under Freedom of Information Act exemption 1. What was declassified was the home address of Mr. and Mrs. Porter, their respective ages, their race, their height, the color of their hair and eyes, and the conclusion, "In view of the above, no further investigation is believed warranted at this time and captioned case is being closed." Every other part of the file, including the dates of the documents, Peterson alleged to be properly classified as exempt from disclosure under Freedom of Information Act exemption 1.

2. See the discussion in Part II, *infra*, on the difference in scope of the claimed exemptions.

The district court examined the file in camera and concluded that the documents had been properly classified under exemption 1 pursuant to an Executive Order. The court also held that, because the Privacy Act exemption applied, the Porters were not entitled to see even those portions of the documents which had been declassified. Thus summary judgment was entered in favor of the Department.[3]

II.

The Justice Department, after the Porters appealed to this court, concluded that it would furnish them with copies of one Peterson affidavit, and with copies of the contents of the file, redacted so as to eliminate all material except that referred to above. Pointing to this disclosure, it contends that if we can affirm on the basis of Freedom of Information Act exemption 1 there is no need to reach the broader exemption which it claims under the Privacy Act.[4] Thus our first inquiry is whether we can affirm the summary judgment *insofar* as it applies to the redacted portions of the documents.

What is immediately apparent from the face of the redacted documents is that they bear classification stamps, with dates and initials, possibly of the classifying officers. The earliest legible date is 5/22/81, but there are a number of later dates, extending through 8/27/82. The classification stamps made in August of 1982 bear the initials RFP, which are, perhaps, those of the affiant Robert F. Peterson. Other initials include rpm, KJ, VRT, and WR. Still others are illegible, and some have been redacted. Peterson's affidavit gives no explanation about the significance of these stamps and initials, or of the identity of the persons whose initials appear. He does not say whether, in exercising his judg-

3. *See* Porter v. United States Department of Justice, 551 F. Supp. 595, 600 (E.D. Pa. 1982).

4. In Provenzano v. Department of Justice, No. 82-5681, argued on the same day as this case, the Privacy Act issue is squarely presented, because no disclosure whatever has been made.

ment to excise the entire contents of the documents except as noted above, he relied on the judgment of those persons. He does not explain what the significance of their notations is. Thus he does not disclose whether, if the notations have to do with classification, their conclusions and his coincided.

The Peterson September 23, 1982 affidavit sets out in considerable detail the development of a four-symbol exemption 1 code to explain handwritten notations on the face of the redacted version of the documents. The Code is as follows:

(b)(1)C 1 Intelligence Source Contact Dates

(b)(1)C 2 Intelligence Source Singular Identifier/ Identifiers

(b)(1)C 3 Information Relating to Intelligence Source Data Collection Capability

(b)(1)C 4 Detailed Information Pertaining to or Provided by an Intelligence Source that Could Reasonably Be Expected to Identify the Source if Disclosed

(b)(1)C 5 Channelization/Dissemination Instructions For Intelligence Source Information

(b)(1)D 1 Information Gathered in the Course of Activity by the United States Aimed at Obtaining Intelligence Information About or From a Foreign Country, Organization, Group or Individual

There are at least forty notations of (b)(1)D 1. There is one notation (b)(1)C 1, three notations (b)(1)C 2, three notations (b)(1)C 3, two notations (b)(1)C 4 and two notations (b)(1)C 5. Thus it appears that only one deletion was required to conceal the date of an intelligence source contact, only three deletions were required to conceal the identity of an intelligence source, only three deletions of information related to intelligence source data collection capability, only two deletions of information might have revealed the identity of an intelligence source, and only two deletions of information related to

channelization/dissemination instructions. Moreover in the instances where C 1 through C 4 notations appear, the symbols refer to the same information. Only in three places is information deleted which would allegedly disclose intelligence sources. The vast bulk of the deletions fall into the category "Information Gathered in the Course of Activity by the United States Aimed at Obtaining Intelligence Information About or From a Foreign Country, Organization, Group or Individual."

The code is a part of an exemption 1 catalog, and that catalog explains that category (b)(1)D 1 deals with the foreign relations or foreign activities of the United States. It describes the information as "Information Gathered in the Course of Activity by the United States Aimed at Obtaining Intelligence Information About or From a Foreign Country, Organization, Group, or Individual." Literally, the category of information includes information completely unrelated to foreign relations, if it happens to have been gathered "in the course of activity by the United States" which is somehow related to intelligence. Perhaps so literal a reading of the catalog is not intended. In discussing the logical nexus between disclosure and damage to national security, however, the catalog states:

> This category of information can be sensitive in nature. This condition exists in part due to the delicate nature of international diplomacy. This information must be handled carefully so as not to jeopardize the fragile relationships that exist between the United States and certain foreign governments. It is my judgment that the disclosure of this information could reasonably be expected to impact negatively on United States foreign relations and result in damage to the national security.

There is considerable ambiguity here, and it is not removed by the cross reference at the end of the quoted

passage to page Y of the Catalog.[5] Moreover the ambiguity is compounded when the redacted papers are compared with the Ogden affidavit, which was disclosed to the Porters. While the Ogden affidavit relies on the Justice Department's interpretation of the Privacy Act as affording a blanket exemption for whole systems of records, it actually discloses that Judith Porter was investigated for possible espionage, 18 U.S.C. §§792-799 (1976), possible sabotage, 18 U.S.C. §§2152-2156 (1976 & Supp. V 1981), and possible violations of the National Security Act of 1947, as amended, 50 U.S.C. §§401-426 (1976 & Supp. V. 1981). Thus the Peterson affidavit, purporting to furnish a *Vaughn* index in compliance with the concededly narrower nondisclosure provisions of the Freedom of Information Act, actually discloses less about the contents of the file than the Ogden affidavit on which the Justice Department relies for the broader Privacy Act exemption which it claims.

---

5. That reference states:

> The unauthorized disclosure of information concerning foreign relations or foreign activities of the United States can reasonably be expected to, *inter alia*:
>
> (a) Lead to foreign diplomatic, economic and military retaliation against the United States;
>
> (b) Identify the target, scope and time frame of intelligence gathering activities of the United States in or about a foreign country, resulting in the curtailment or cessation of these activities;
>
> (c) Enable hostile entities to assess United States intelligence gathering activities in or about a foreign country and devise countermeasures against these activities;
>
> (d) Compromise cooperative foreign sources, jeopardize their safety and curtail the flow of information from these sources;
>
> (e) Endanger citizens of the United States who might be residing or traveling in the foreign country involved;
>
> resulting in damage to the national security.

We recognize that there is tension between the discovery provisions of the Federal Rules of Civil Procedure and the Freedom of Information Act exemptions from disclosure. But we have held, along with most courts which have considered the issue, that Congress did not intend to leave a requester "helpless to contradict the government's description of information or effectively assist the trial judge." *Ferri v. Bell*, 645 F.2d 1213, 1222 (3d Cir. 1981). Had the Peterson *Vaughn* index been disclosed, counsel would have been able to raise the questions about it which we have noted above. The trial court could then have considered the appropriateness of limited discovery such as has been ordered by some courts. *See, e.g., Stein v. Department of Justice*, 662 F.2d 1245, 1253 (7th Cir. 1981); *Phillippi v. Central Intelligence Agency*, 546 F.2d 1009, 1013, 1014 n.12 (D.C. Cir. 1976); *Schaffer v. Kissinger*, 505 F.2d 389, 391 (D.C. Cir. 1974); *Murphy v. Federal Bureau of Investigation*, 490 F.Supp. 1134, 1136 (D.D.C. 1980). Consideration of some discovery would appear to be particularly appropriate in this instance, in which the Porters allege that the only investigation took place over a decade ago, while the classification stamps were placed on the documents only after their March 1981 request. The Peterson affidavit, and the redacted documents, demonstrate the need for further inquiry. A summary judgment that Freedom of Information Act exemption 1 applies is inappropriate. Fed. R. Civ. P. 56(f).

III.

Since we have concluded that the summary judgment cannot be affirmed on the authority of exemption 1 of the Freedom of Information Act, we must consider the Justice Department's alternative position that the Privacy Act authorizes nondisclosure. Section 3 of that Act added to Title 5 of the United States Code, section 552a

A. The Justice Department:
Interpretation of the Privacy Act

The Department's position depends upon the interrelationship of three subsections of section 552a. The first provides:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be —
>
> (2) required under section 552 of this title [the Freedom of Information Act]; . . . .

5 U.S.C. §552a(b) (1982). This subsection implements the basic policy of the Privacy Act, announced in the legislative findings, of safeguarding constitutionally recognized individual privacy rights.[6] It prohibits disclosure of

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6. In Section 2(a) of the Privacy Act Congress found that:

> (1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;
>
> (2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;
>
> (3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;
>
> (4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and
>
> (5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

Privacy Act of 1974, Pub. L. No. 93-579, §2(a), 88 Stat. 1896, 1896.

the contents of systems of records[7] pertaining to individuals except with their consent, unless the disclosure falls in one of eleven separate categories. The second exception is disclosure mandated by the Freedom of Information Act. The plain language of section 552a(b)(2) is that the prohibition on disclosure in the Privacy Act is inapplicable to Freedom of Information Act requests. The Department of Justice concedes that this is so with respect to a Freedom of Information Act request made by anyone in the world other than the individual who is identified in a system of records.

The second relevant subsection provides:

> Each agency that maintains a system of records shall —
>
> (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made of all or any portion thereof in a form comprehensible to him; . . . ;
>
> (2) permit the individual to request amendment of a record pertaining to him . . . ;
>
> (3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal . . . .

5 U.S.C. §552a(d) (1982). Section 552a(d) implements the congressional policy of minimizing harm to individuals flowing from the maintenance of inaccurate information about them in a system of records which even under the strictures of section 552a(b) may be disseminated to

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7. 5 U.S.C. §552a(a)(5) (1982) provides:

> [T]he term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual; . . . .

eleven categories of recipients. This access provision is relevant to the instant case because it is the Justice Department's position that it is a *pro tanto* repeal of the Freedom of Information Act. The Department concedes that until the Privacy Act individuals could, under the Freedom of Information Act, gain access to records pertaining to themselves, subject only to the exemptions contained in that statute. It now urges, contrary to the position it took until sometime late in 1981, that section 552a(d) of the Privacy Act eliminated that Freedom of Information Act right, and became, for individuals, the sole means of access to records pertaining to themselves. That being the case, the Department urges, the exception in section 552a(b)(2), preserving access through the Freedom of Information Act, should be read as applicable to every requester in the world except the individual named in a system of records.

The third Privacy Act subsection on which the Department of Justice relies provides:

> The head of any agency may promulgate rules . . . to exempt any system of records within the agency from any part of this section except subsection (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10) and (11), and (i) if the system of records is —
>
> (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws . . . .

5 U.S.C. §552a(j)(2) (1982); *see also* 5 U.S.C. §552a(k)(2) (1982). The Department of Justice has adopted regulations pursuant to section 552a(j)(2), exempting the entire Central Record System of the FBI. 28 C.F.R. §16.96 (1982). Since the listing of exceptions in section 552a(j) does not include section 552a(d), it is the Department's position that by the adoption of these regulations the files of the FBI are totally exempt from

disclosure to a section 552a(d) requester. That being the case, there is no need to furnish a *Vaughn* index to any such requester or to disclose non sensitive portions of records.

It is not the Department's position that promulgation of 28 C.F.R. §16.96 (1982) created a blanket Freedom of Information Act exception for FBI files. That position would be inconsistent with the plain language both of section 552a(b)(2) and of other parts of the Privacy Act such as section 552a(c)(1), which unequivocally contemplate the continued operation of the Freedom of Information Act.[8] Rather, the Department's reliance on section 552a(j) depends entirely upon its contention that section 552a(d) was a *pro tanto* repeal of the Freedom of Information Act, by making section 552a(d), for individuals, the sole means of access to records in which they are mentioned. It concedes that any third party could, under the Freedom of Information Act, and subject to its specific exemptions, gain access to the same records. It concedes, moreover, that a corporation or partnership could obtain information about itself under the Freedom of Information Act.

B. The Porters' Request

The initial request, signed by Mr. Porter alone, read "Please send me a copy of any file you have on me or my wife — Judith Porter." The government's responses establish that there is no file on Mr. Porter. Thus, *prima facie*, we are dealing with a third-party request by Porter for a file on Mrs. Porter. In their complaint, however, the Porters allege that "[O]n March 18, 1981, pursuant to the Freedom of Information Act ("FOIA"), Mr. and Mrs. Porter requested that a search of the records of the Fed-

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8. Section 552a(c)(1) excepts from the accounting requirements of the Privacy Act disclosures made under subsection (b)(2), that is, pursuant to the Freedom of Information Act.

eral Bureau of Investigation for material pertaining to either of them be undertaken and that any such material be released to them." The Department of Justice would have us construe the request by Porter as having been made by both Porters, each for his or her own file. We do not think the quoted allegation in the complaint can fairly be so construed. The complaint relies solely on the Freedom of Information Act, and was drafted before the Porters were informed of the Department's contention that the Freedom of Information Act was inapplicable to first-party requests. Thus it would be fundamentally unfair to rely on the wording of the complaint to convert Mr. Porter's third-party request for the contents of the file on his wife into a first-party request.

The Department of Justice points out that in response to its form letter both of the Porters, on April 22, 1981, furnished written consent to the release of any documents in the FBI files pertaining to them. This was done in response to a sentence in the form letter:

> Before we can commence processing your request for records pertaining to another individual, we must know whether you have been authorized by that individual to receive these documents. It will be necessary for you to submit to the FBI the original of a written authorization which has been duly attested by a Notary Public.

Clearly the most that can be read into the Porters' April 22, 1981 response is that each was consenting to the release to the other of information in his or her own file. The response is entirely consistent with the position that Porter was pursuing a third-party request for the contents of his wife's file.

Finally, the Department of Justice urges that a husband's request for examination of the contents of his wife's file should be treated as a sham third-party request. Certainly we are not prepared to hold that this is so in every case as a matter of law, for no authority has

been cited to us in support of so extraordinary a proposition. Arguably, some ostensible third-party requests might as a matter of fact be made on behalf of a first-party requester. But the issue would be factual. In the summary judgment record before us, however, neither the Ogden affidavit which was revealed to the Porters nor the Peterson affidavit which was not revealed until appellees' brief was filed, suggests that the third-party request was a sham. The trial court, moreover, made no reference to the question whether Mr. Porter's request for his wife's record was a sham.

Thus on this record, even assuming that the Justice Department correctly construes section 552a(d) as a *pro tanto* repeal of the Freedom of Information Act, the summary judgment in its favor cannot stand. We are dealing with what on its face is a third-party rather than a first-party request. The Department concedes that the Freedom of Information Act applies to third-party requests.

C. The Proceedings on Remand

The Justice Department's position that Porter's request for the file on his wife may be a sham suggests that there will be further proceedings in an attempt to establish as much factually. That effort would involve the parties and the court in further time consuming and expensive proceedings, proceedings which would be entirely fruitless if the Justice Department's contention that section 552a(d) is the exclusive access route for first-party requesters were to be rejected. Thus even though on the Department's own interpretation of the Privacy Act summary judgment cannot stand, it is appropriate to address the merits of that interpretation.[9]

Thus far three courts of appeals have considered the question whether the Privacy Act bars first party access

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9. *See* note 4 *supra*.

under the Freedom of Information Act to entire systems of records exempted by agency action. The first is *Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980), in which without analysis the court simply stated the result.[10] The second is *Painter v. Federal Bureau of Investigation*, 615 F.2d 689 (5th Cir. 1980), in which the court, without analysis, relied on *Terkel v. Kelly*. *Id.* at 691 n.3. It was not until the Court of Appeals for the District of Columbia Circuit decided *Greentree v. United States Customs Service*, 674 F.2d 74 (D.C. Cir. 1982), that any appellate court made a searching analysis of the interrelationship between the two statutes.

In *Greentree* the district court had held that section 552a(j) exemptions were "specifically exempted from disclosure by statute" within the meaning of section (b)(3) of the Freedom of Information Act, 5 U.S.C. §552(b)(3) (1982). The court so held despite the fact that the Department of Justice did not agree with that interpretation. *Greentree v. United States Customs Service*, 515 F.Supp. 1145, 1148 (D.D.C. 1981). On appeal the Justice Department changed its position. That change in position prompted Judge Wald to write extensively on the text and legislative history of the Privacy Act, and to conclude that the Department was simply wrong. We find Judge Wald's analysis entirely persuasive. No point would be served by duplicating it. We do, however, deem it appropriate to make some additional observations.

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10. The *Terkel* court's analysis consists of this sentence:

> Although the Freedom of Information Act does not contain a comparable exemption [to section 552a(k)(5)], we agree with the lower court that the two statutes must be read together, and that the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt.

599 F.2d at 216. No mention is made of 5 U.S.C. §552a(b)(2) (1982).

First, the text of the Privacy Act lends no real support to the Justice Department's interpretation. Section 552a(j) and section 552a(k) which authorize agencies to promulgate exemptions for systems of records both refer to exemptions only "from any part of this section." The plain language refers only to exemptions from the provisions of section 552a, not to any other section in Title 5, or to any other disclosure statute. Had Congress intended to authorize the creation by regulation of exemptions from the Freedom of Information Act it would have used language such as "this title" rather that "this section." Moreover the language in section 552a(b)(2) could hardly be clearer. This nondisclosure provision expressly excepts disclosures required under the Freedom of Information Act. The language Congress chose in section 552a(b)(2) of the Privacy Act simply cannot be tortured so as to convey an intention to repeal it in part. The Justice Department's contention that section 552a(b)(2) refers only to third-party requests is not apparent on the face of the statute. Even if it were to be so read, however, that reading would not support the inference that the section repeals any part of another statute. At most it would support the inference that for first-party requesters a request is the equivalent of consent.[11] Thus the Justice Department's entire construction depends on the language of the Privacy Act access provision, section 552a(d). There is not a word in that section suggesting that the special remedy which it provides for the vindication of the privacy rights which Congress identified in its legislative findings was to be exclusive of all other rights which the law might elsewhere provide.

Since nothing in the language of section 552a(d) can be read as an express *pro tanto* repeal of the Free-

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11. Reference to exemption 3 of the Freedom of Information Act therefore adds nothing to the analysis. The Privacy Act is an exemption statute only if one accepts the proposition that section 552a(d) is the exclusive means of first-party access.

dom of Information Act, the Justice Department's effort must be considered as an attempt to find a *pro tanto* repeal by implication. The proponent of such a proposition is faced with the formidable barrier of the settled rule of statutory construction to the contrary. "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). An implied repeal will be found " '(1) where provisions in the two acts are in irreconcilable conflict, . . . and (2) if the latter act covers the whole subject of the earlier one and is clearly intended as a substitute . . . .' " *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (citing *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)). That standard is not satisfied here. The Privacy Act and the Freedom of Information Act are perfectly reconcilable by reading the special remedy in section 552a(d) as serving to vindicate privacy interests in a special manner, while leaving standing the preexisting Freedom of Information Act remedy providing access to information for its own sake. Moreover the Privacy Act expressly states that it is not intended as a substitute for the Freedom of Information Act. Indeed its basic thrust is in an opposite direction. To a large extent, though not entirely, it is designed to discourage rather than encourage disclosure of information impinging upon the privacy of individuals. Given the strict rule against repeals by implication, a legislative intent to accomplish such a repeal in this instance would have to appear in the legislative history with overwhelming clarity. There is no such clarity.

There is a certain amount of ambiguity in the legislative history of the Privacy Act, with statements by members of Congress in which each side purports to find support. That legislative history is reprinted in Staff of Senate Comm. on Gov't Operations & House Comm. on Gov't Operations, Subcomm. on Gov't Information and Individual Rights, 94th Cong., 2d Sess., Legislative

History of the Privacy Act of 1974, S. 3418 (Public Law 93-579), Source Book on Privacy (Joint Comm. Print 1976) [Source Book]. The Source Book reveals that the ambiguities arose primarily because the Senate and the House of Representatives adopted separate bills, S. 3418 introduced by Senator Ervin and H.R. 16373 introduced by Congressman Moorhead. *Id.* at 9, 239. Each bill was amended in the chamber in which it originated. Eventually each chamber rejected the bill passed by the other. Finally, shortly before the December 31, 1974 recess, a compromise bill was adopted, which included the provision in section 552a(b)(2), permitting disclosure, without the consent of an individual named therein, of records the disclosure of which was required by the Freedom of Information Act. *Id.* at 502. An equivalent provision had been included in the original H.R. 16373, but was deleted by the House Committee on Government Operations. *Id.* at 242-43, 279-80. Although the language of section 552a(b)(2) had not been a part of S. 3418, the Senate Bill as reported from the Committee on Government Operations did provide in section 205(b) that "[n]othing in this act shall be construed to permit the withholding of any personal information which is otherwise required to be disclosed by law or any regulation thereunder." *Id.* at 143. The intermediate version of H.R. 16373 as approved by the House Committee arguably would have applied Privacy Act exemptions to all Freedom of Information Act requests, while S. 3418 would have confined those exemptions to Privacy Act obligations. The compromise bill, restoring the original language of H.R. 16373, was obviously intended to adopt the policy embodied in section 205(b) of S. 3418, which applied to both first-party and third-party requests. The report accompanying the compromise bill notes:

> The Compromise amendment would add an additional condition of disclosure to the House bill which prohibits disclosure without written request

> of an individual unless disclosure of the record would be pursuant to Section 552 of the Freedom of Information Act. This compromise is designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information under that section.

Source Book, *supra*, at 861. Thus, as noted by the *Greentree* court, *see Greentree*, *supra*, 674 F.2d at 81, the enacted version of the Privacy Act reflects the successful effort to keep separate the exemptions in the Privacy Act and the Freedom of Information Act.

We have searched the legislative history of all versions of S. 3418, H.R. 16373, and the compromise bill, which was enacted, and we have found nothing which suggests that Congress intended Privacy Act section 552a(d) to be a partial repeal of the Freedom of Information Act by making it the sole means of access for first-party information. The construction of the Privacy Act for which the Department of Justice contends depends, ultimately and completely, on clear evidence of such an intention. In no other manner can the "this section" language of section 552a(j) and (k) be stretched so as to apply to Freedom of Information Act requests made by first parties. Thus the legislative history of the Privacy Act utterly fails to overcome the presumption against repeals by implication.

Nor can the Department of Justice rely on any supposed expertise with respect to the statute it is charged with administering. In the first place, as the *Greentree* court points out, that department's interpretation of the statute has vacillated. *Greentree*, *supra*, 674 F.2d at 84-85. Moreover, the Justice Department is not the only federal agency with obligations under the Privacy Act. Under section 6 of the Privacy Act, the Office of Management and Budget is charged with the responsibility for developing guidelines and regulations for the Act's implementation by government agencies. Privacy Act of

1974, Pub. L. No. 93-579, §6, 88 Stat. 1896, 1909. Since 1975 those guidelines have provided:

> In some instances under the Privacy Act an agency may (1) exempt a system of records (or a portion thereof) from access by individuals in accordance with the general or specific exemptions (subsection (j) or (k)); or (2) deny a request for access to records compiled in reasonable anticipation of a civil action or proceeding or archival records (subsection (d)(5) or (1)). In a few instances the exemption from disclosure under the Privacy Act may be interpreted to be broader than the Freedom of Information Act (5 U.S.C. 552). In such instances the Privacy Act should not be used to deny access to information about an individual which would otherwise have been required to be disclosed to that individual under the Freedom of Information Act.
>
> . . .
>
> It is our view that agencies should treat requests by individuals for information pertaining to themselves which specify either the FOIA or the Privacy Act (but not both) under the procedures established pursuant to the Act specified in the request. Where the request specifies, and may be processed under, both the FOIA and the Privacy Act, or specifies neither Act, Privacy Act procedures should be employed. The individual should be advised, however, that the agency has elected to use Privacy Act procedures, of the existence and the general effect of the Freedom of Information Act, and of the differences, if any, between the agency's procedures under the two Acts (e.g., fees, time limits, access and appeals).
>
> The net effect of this approach should be to assure the individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than that they had prior to its enactment.

40 Fed. Reg. 56742-43. Thus the contemporaneous interpretation of the Privacy Act by an agency charged by Congress with specific responsibility for the development of guidelines and regulations for the Act's implementation is entirely consistent with the interpretation which the Justice Department formerly embraced. According to the Justice Department (*see* Brief at 35), the Office of Management and Budget is now considering a revision of those guidelines. That does not alter the value of the extant guidelines as a reflection of the contemporaneous understanding of the agency as to the intention of the ninety-third Congress. *See Greentree*, *supra*, 674 F.2d 74, 85 & n.28.

We conclude, therefore, that the trial court erred in holding that the Privacy Act was the sole means of access for individual records and that the systems of records exemption of 5 U.S.C. §552a(j)(2) (1982) applied to an individual Freedom of Information Act request. Thus the *Vaughn* index should have been disclosed to the requesters, and the procedures mandated by *Ferri v. Bell*, 645 F.2d 1213, 1220 (3d Cir. 1981), followed.

IV.

The summary judgment in favor of the Department of Justice will be reversed, and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5681

PROVENZANO, ANTHONY,

Appellant

v.

UNITED STATES DEPARTMENT OF JUSTICE,
WILLIAM FRENCH SMITH, Attorney
General of the United States, and
WILLIAM H. WEBSTER, Director of the
Federal Bureau of Investigation

(D.C. Civil No. 81-3767)

SUR PETITION FOR REHEARING

Present: **SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and MANSMANN, *District Judge**

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

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*Hon. Carol Los Mansmann, United States District Judge for the Western District of Pennsylvania, sitting by designation.

Judges Adams, Weis, Garth and Becker would grant rehearing.

By the Court,

JOHN J. GIBBONS

Judge

Dated: November 10, 1983

STATEMENT SUR DENIAL OF PETITION FOR REHEARING

ADAMS, *Circuit Judge*.

Anthony Provenzano, who has a host of serious convictions on his record and who admittedly has been involved in organized crime, has requested that the government turn over all FBI and Department of Justice files relating to him and to his activities. Although one of the goals of the Privacy Act is to make material available to first party requesters, a persuasive argument may be made that Exemption Three of the Freedom of Information Act (FOIA) authorizes the government to deny Provenzano's request. 5 U.S.C.§ 552(b)(3) (1977). That exemption incorporates into FOIA other statutes providing for non-disclosure, and exemption (j)(2) of the Privacy Act, 5 U.S.C. 552a(j)(2) (1977), seems to allow directors of criminal enforcement agencies to exempt entire "systems of records" from first-party access.

Since there is now a square conflict among the Circuits on this issue -- the Fifth and Seventh Circuits going one way and the District of Columbia Circuit going the other -- and since this matter is of considerable importance to the administration of criminal justice, I respectfully suggest that the question presented requires the attention of the entire court. *See Greentree v. United States Customs Service*, 674 F.2d 74 (D.C. Cir. 1982); *Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980); *Terkel v. Kelly*, 599F.2d 204 (7th Cir. 1979), *cert. denied*, 444 U.S. 1083 (1980).

It is difficult for me to believe that in enacting FOIA and the Privacy Act, Congress intended to make it possible for someone in the position of Provenzano to require that the FBI and the Department of Justice turn over an entire system of records. An open government is surely one of the fundamental prerequisites of democracy; that is not to say, however, that law

enforcement agencies, under the supervision of the legislature and the courts, may not legitimately under law limit access to investigative material.

Judge Weis and Judge Garth join in this statement.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 91-3787

Filed: Oct. 7, 1992

ANTHONY PROVENZANO, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS.

OPINION

FISHER, *Chief Judge.*

This case arises out of a dispute over whether information requested by plaintiff, Anthony Provenzano, is available to him under the Freedom of Information Act (FOIA), or exempt from release under the Privacy Act as defendants contend. Plaintiff moves for a summary judgment compelling defendants to release the subject records. Defendants move for a summary judgment, urging that (1) the court lacks subject-matter jurisdiction; (2) the court lacks personal jurisdiction over defendants William French Smith and William H. Webster; and (3) while the Privacy Act, 5 U.S.C. § 552a, provides the exclusive remedy for plaintiff, it exempts such records from release.

Under Fed. R. Civ. P. 56(c) summary judgment may be granted only if there is no dispute as to a material fact and the moving party is entitled to judgment as a matter of law. In considering such a motion, I must view the evidence in a light most favorable to the party opposing the motion, drawing every reasonable inference in his favor. *Small* v. *Seldowe Stationery*, 617 F.2d 992, 994 (3d Cir. 1980). With that standard in mind, I have considered the pleadings and affidavits and have concluded that defendants are entitled to summary judgment. The Justice Department has shown that each document that falls within the requested class of documents is wholly exempt from disclosure through the Privacy Act and the FOIA.

In April 1979 plaintiff requested that the Federal Bureau of Investigation and the criminal division of the Justice Department provide him "a copy of all files ... indexed or maintained" under his name and "all documents containing his name." Such request was made under the FOIA, 5 U.S.C. § 552.

In July 1980 plaintiff filed an administrative appeal challenging the criminal division's failure to respond to his request. The Justice Department informed plaintiff that due to the volume, they would not be able to process his request, number seventy-six on a projected list, for 25 months or until September 1982. Unwilling to wait, plaintiff commenced this action to compel release of the records, naming as defendants the Department of Justice; William French Smith, the Attorney General of the United States; and William H. Webster, Director of the Federal Bureau of Investigation.

Contrary to defendants' assertion, this court has subject-matter jurisdiction pursuant to 5 U.S.C. §§ 552(a)(4)(A) and 552(a)(6)(A), (B) and (C). Defendants also contend this court lacks personal jurisdiction over defendants Smith and Webster because actions under the FOIA and the Privacy Act can only be brought against an "agency" of the federal government and not against any individual government employee or officer. *See Reader's Digest Ass'n, Inc.* v. *F.B.I.*, 524 F. Supp. 591, 593 (S.D.N.Y. 1981). While the court recognizes this principle, the better action is to consider the complaint amended to name the department as the proper party, rather than to dismiss the action against it. In such a case, the department is on notice of the suit and there is no prejudice. *See Hamlin* v. *Kelley*, 433 F. Supp. 180 (N.D. Ill. 1977); *Providence Journal Co.* v. *F.B.I.*, 460 F. Supp. 778 (D.R.I. 1978), *rev'd on other grounds*, 602 F.2d 1010 (1st Cir.), *cert. denied*, 444 U.S. 1071 (1979). This court, therefore, has jurisdiction over the Department of Justice and the F.B.I.

The real question is whether plaintiff can proceed under the FOIA to compel release of his records or whether the records are exempt from release under the Privacy Act. To answer this, I must examine the nature of the requested documents.

whom such material pertains. The systems which have thus been exempted include JUSTICE/FBI-002 and JUSTICE/CRM-001, 002, 003, 010, 012, 019, and 022. These systems of records contain all of the records that are included in plaintiff's request for records.

In cases under the FOIA, federal courts accord substantial weight to an agency's affidavit concerning the details of the classified status of a disputed record. S. Rep. No. 93-1200, 93d Cong. 2d Sess. 12 (1974). Under the Privacy Act, therefore, plaintiff is barred from receiving the documents in question.

In March 1982, the F.B.I. advised plaintiff that all of the records he requested were exempt from release pursuant to exemption (j)(2) of the Privacy Act and exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3).

The FOIA requires each agency of the federal government to respond to any request for records by making such records promptly available to the person who requests them. 5 U.S.C. § 552(a)(3). The records may be withheld, however, insofar as they contain matters within the scope of the FOIA's nine statutory exemptions, 5 U.S.C. § 552(b)(1)-(9). *NLRB* v. *Robbins Tire and Rubber Co.*, 437 U.S. 214, 221 (1978).

Pertinent to our discussion here is FOIA exemption 3, 5 U.S.C. § 552(b)(3), which excludes from the coverage of the FOIA matters that are

> specifically exempted from disclosure by statute (other than § 552b of this title [5 U.S.C. § 552b], provided that such statute
> (A) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue, or
> (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

In response to plaintiff's request for records, both the F.B.I. and the criminal division conducted searches for records "indexed or maintained" under Anthony Provenzano's name. According to the affidavit of Special Agent James C. Felix, the F.B.I. found a number of files pertaining to F.B.I. investigations concerning kidnapping, interstate gambling activities, civil rights, and other matters. These were all contained in the F.B.I.'s "Central Records System," formally known as JUSTICE/FBI-002 or 28 C.F.R. § 16.96(a)(1). According to the affidavit of Douglas S. Wood, attorney for the criminal division of the Justice Department, it was determined that a number of records included in plaintiff's request were contained in the eight Justice Department "system of records."[1]

Pursuant to exemption (j)(2) of the Privacy Act, 5 U.S.C. § 552a, the Justice Department issued two regulations, 28 C.F.R. §§ 16.91 and 16.96, which exempt certain systems of records from the requirement that material contained therein be released to individuals to

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[1] The eight "systems of records" are:
1. JUSTICE/CRM-001, Central Criminal Division Index File
2. JUSTICE/CRM-002, Crim. Div. Witness Security File
3. JUSTICE/CRM-003, File of Names Checked to Determine If Those Indiv. Have Been Subject of an Electronic Surveillance
4. JUSTICE/CRM-010, Organized Crime & Racketeering Information System
5. JUSTICE/CRM-012, Organized Crime & Racketeering Section, Gen. Index File
6. JUSTICE/CRM-014, Organized Crime & Racketeering Section, Intelligence and Special Services Unit, Information Request System
7. JUSTICE/CRM-019, Applications for Electronic Intereceptions
8. JUSTICE/CRM-022, Witness Immunity Records

As originally enacted, exemption 3 simply shielded material "specifically exempted from disclosure by statute." In 1976 Congress narrowed the exemption.[8] The legislative purpose of this amendment has been discussed elsewhere. For example, in *Irons and Sears* v. *Dunn*, 606 F.2d 1215, 1219-20 (D.C. Cir. 1979), *cert. denied*, *Irons and Sears* v. *Commissioner of Patents and Trademarks*, 444 U.S. 1075 (1980), the court summed up the legislative history by stating

> Congress' goal was to overrule legislatively the Supreme Court's decision in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975), which had given an expansive reading to the version of Exemption 3 then in force. The amended text and its legislative history make clear that Congress did not want the exemption to be triggered by every statute that in any way gives administrators discretion to withhold documents from the public. On the contrary . . . [i]t provided that only explicit nondisclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.[9]

In addition, a statute may serve as a basis for a withholding statute under exemption 3 if it is "the product of congressional appreciation of the dangers inherent in airing particular data and incorporates a formula

[8] The amendment was part of the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976).

[9] In the original House Resolution discussing 5 U.S.C. § 552(b)(3), Congress noted that there were nearly 100 statutes or parts of statutes which restricted public access to specific government records, and 5 U.S.C. § 552(b)(3) did not modify these statutes. *Sears* v. *Gottschalk*, 357 F. Supp. 1327 (E.D. Va. 1973).

> whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw." *American Jewish Congress* v. *Kreps*, 574 F.2d 624, 628-29 (D.C. Cir. 1978).

With this background, I turn to the Privacy Act, 5 U.S.C. § 552a(j) which provides that

> [t]he head of any agency may promulgate rules, in accordance with requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title [5 USCS §§ 553(b)(1)-(3), (c), and (e)], to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—
>
> (1) maintained by the Central Intelligence Agency; or
>
> (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

> At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title [5 USCS § 553(c)], the reasons why the system of records is to be exempted from a provision of this section.

Thus, the precise question here is whether the Privacy Act is a statute within the meaning of the FOIA exemption 3.

I recognize that section 552a(j) fails to satisfy fully the first part of the proviso on exemption 3. The Privacy Act section (j) simply is not a statute which requires nondisclosure "in such a manner as to leave no discretion on the issues." FOIA, 5 U.S.C. § 552(b)(3)(A) (emphasis added). There is both discretion in the promulgation and enforcement of the statute. *See* 28 C.F.R. § 16.57(b). However, it is quite clear that the requirements set forth in exemption 3 are in the disjunctive, and it is, therefore, sufficient if either (A) or (B) of the proviso is satisfied. *See Seymour* v. *Barabba*, 559 F.2d 806, 807-08 (D.C. Cir. 1977).

I am persuaded that section 552a(j)(2) is the product of "congressional appreciation of the dangers in airing particular data." *American Jewish Congress* v. *Kreps*, 574 F.2d at 628-29. Consistent with the legislative purpose of the Privacy Act, the identity of confidential sources will not be compromised; subjects of an investigation of an actual or potential criminal violation will not be alerted to the investigation; the physical safety of witnesses, informants, and law enforcement personnel will not be endangered; the privacy of third parties will not be violated. *See* 28 C.F.R. §§ 16.76(e), 16.81(c).

The Third Circuit has held that to fall within the FOIA exemption 3, the exempting statute must prescribe some basis upon which an administrative determination to exempt is made. *Stretch* v. *Weinberger*, 495 F.2d 639 (3d Cir. 1974). A clear articulation of such is found in 28 C.F.R. §§ 16.91 and 16.96.

A growing number of courts have held that the exemptions to the Privacy Act are withholding statutes under exemption 3 of the FOIA. *Painter* v. *F.B.I.*, 615 F.2d 689 (5th Cir. 1980) (holding section 552a(k)(5) is a withholding statute); *Heinzl* v. *Immigration and Naturalization Service*, No. C 80-1210 SAW (N.D. Cal. Dec. 18, 1981) (holding section 552a(k)(2) is a withholding statute); *Anderson* v. *Hoff*, Civil Action No. 3-82-55 (D. Minn. June 8, 1982).

In *Anderson*, as in the instant case, the plaintiff sought the release of Justice Department records pertaining to himself that came within the scope of exemption (j)(2) of the Privacy Act. The court held that since the material came within (j)(2), it was exempt from release under FOIA exemption 3. The court indicated that (j)(2) was a statute which "establishes particular criteria for withholding or refers to particular types of material to be withheld." Slip op. at 3. The material requested, therefore, was exempt under both the Privacy Act and the FOIA.

In the only case which purports to do so, *Greentree* v. *United States Customs Service, et al.*, 674 F.2d 74 (D.C. Cir. 1982), the court held that the Privacy Act ought not be considered a FOIA withholding statute. For the district court in *Greentree*, the question of whether the Privacy Act was a withholding statute was resolved by the fact that the Act does refer to "particular types of matter to be withheld." It is important to note that in reversing the district court, the circuit court bypassed an examination of subsection (B) of FOIA exemption 3. The court saw no need to determine whether section (j)(2) met the qualifications of an exemption 3 statute. *Id.* at 79 (emphasis added).

For the reasons stated above, I find section 552a(j)(2) to be a withholding statute within the meaning of the FOIA, 5 U.S.C. § 552(b)(3). Plaintiff's motion is denied and defendants' motion for summary judgment is granted. Defendants will submit an order within 10 days. No costs.

OCTOBER 7, 1982.

APPENDIX E
ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 81-3767

ANTHONY PROVENZANO, PLAINTIFF,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS.

ORDER

Hon. Clarkson S. Fisher

Upon the cross motions of plaintiff and defendants for summary judgment, the papers submitted in connection therewith, and all other papers and proceedings had herein, it is by the Court this 18th day of October, 1982,

ORDERED that plaintiff's motion for summary judgment be, and it hereby is, denied; and it is further

ORDERED that defendants' motion for summary judgment be, and it hereby is, granted; and it is further

ORDERED that the above-captioned action be, and it hereby is, dismissed with prejudice and without costs.

/s/ Clarkson S. Fisher
CLARKSON S. FISHER
United States District Judge

APPENDIX F

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 82-2018 and 82-2019

ALFRED B. SHAPIRO and GREGORY J. WENTZ,

Plaintiffs-Appellants,

v.

DRUG ENFORCEMENT ADMINISTRATION,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.
Nos. 82-C-99 and 82-C-243—John C. Shabaz, *Judge.*

ARGUED SEPTEMBER 16, 1982—DECIDED NOVEMBER 16, 1982

Before BAUER, WOOD, *Circuit Judges*, and NEAHER,* *Senior District Judge.*

BAUER, *Circuit Judge.* Plaintiffs-appellants Shapiro and Wentz each were convicted in unrelated cases of violating 21 U.S.C. § 841 (1980), and both currently are serving prison terms. Shapiro and Wentz filed separate requests with the Drug Enforcement Administration (DEA) seeking access to their DEA files pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (1976)

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* The Honorable Edward R. Neaher, Senior Judge of the United States District Court for the Eastern District of New York, is sitting by designation.

(FOIA) and the Privacy Act, 5 U.S.C. § 552a (1975) (Privacy Act). The district court denied their requests on the ground that the records are exempt under Privacy Act Section (*j*)(2) (Exemption (*j*)(2)) and FOIA Section (b)(3) (Exemption 3). We affirm.

I. BACKGROUND

In May 1981, Wentz filed a request with the DEA to obtain a copy of the DEA records pertaining to him; Shapiro made his request in October 1981. In April 1982, the DEA notified Wentz that all the documents he requested were in the DEA Investigative Reporting and Filing System and thus were exempt from access pursuant to Exemption (*j*)(2) of the Privacy Act and Exemption 3 of the FOIA. In June 1982, the DEA notified Shapiro that his request had been denied for the same reasons.

In March 1982, Wentz filed suit to compel release of the documents he had requested. Wentz later added a claim that the agency be required to correct allegedly inaccurate information in his files pursuant to the Privacy Act. Shapiro filed his suit in May 1982.

The district court consolidated the two cases because they raised identical issues. In October 1982, the district court granted the DEA's motions for summary judgment. The court held that the DEA had met the Privacy Act Exemption (*j*)(2) requirements by exempting these records from disclosure at 28 C.F.R. § 16.98(c). The district court also held that because the Privacy Act is a statute that exempts this information from disclosure, the information is exempt under FOIA Exemption 3 as well. Finally, the court held that since Privacy Act Exemption (*j*)(2) applies to the Act's correction provisions, Wentz's request for correction of the allegedly inaccurate records also must be denied.

II. PRIVACY ACT EXEMPTION (*j*)(2)

Congress enacted the Privacy Act in 1974. The Act guarantees individuals access to certain agency records about themselves, *see* 5 U.S.C. § 552a(d), and prevents the

release of such records to third parties without the consent of the individual except under specific instances, *see* 5 U.S.C. § 552a(b). The Privacy Act applies only to agency "records," which the Act defines as agency files or documents about individuals, contained in a "system of records," which is a group of agency records from which an agency retrieves information using the name of the individual or some other personal identifier. *See* 5 U.S.C. §§ 552(a)(4) and (5).

An individual's right of access under the Privacy Act is not unlimited, however. Sections (j) and (k) of the Act give agencies the discretion to refuse to disclose certain records. Under (j)(2), the head of an agency whose principal function is law enforcement may promulgate rules exempting from access any system of records containing information compiled for the purpose of criminal investigation.[1]

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[1] 5 U.S.C. § 552a(j) provides:

> The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of section 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—
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> • • •
>
> (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement,

(Footnote continued on following page)

The DEA has promulgated a regulation pursuant to Exemption (j)(2) that exempts its Investigative Reporting and Filing System from access to individuals.[2] The regulation justifies the exemption on the ground that access to such records would alert a subject to the existence of an investigation and thereby impede law enforcement efforts.[3] As the district court held, this explanation is sufficiently specific to satisfy the (j)(2) requirement that the regulation include reasons why the system is to be exempted.

Appellants' argument that this explanation renders the exemption inapplicable to them because they currently are imprisoned is without merit. First, the fact that appellants already have been convicted does not mean that the DEA is no longer investigating them. Moreover, Exemption (j)(2) does not require that a regulation's rationale for exempting a record from disclosure apply in each particular case. It is sufficient that the system of records be exempted properly, as the DEA has done here.

The DEA supported its motion for summary judgment in each case with an affidavit by Rupe Arvien, the chief of

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[1] continued

> release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.
>
> At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

The Act labels this a "general" exemption, as opposed to the "specific" exemptions at 5 U.S.C. § 552a(k).

[2] The regulation appears at 28 C.F.R. 16.98(c).

[3] 28 C.F.R. 16.98(d)(3).

the DEA's Freedom of Information Division. The affidavits stated that all references to Wentz and Shapiro are contained in criminal investigatory files that have been exempted according to published regulations.[5]

Wentz and Shapiro argue that the Avalon affidavits are insufficient. They contend that this court should require the DEA to prepare a *Vaughn* index of the requested documents, which would oblige the agency to "specify in detail which portions of the document are disclosable and which exempt." *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1977).

While courts mandate *Vaughn* indexing where an agency relies solely on an FOIA exemption to withhold information, the procedure does not apply to Exemption (*j*) of the Privacy Act. The FOIA exemptions are "specific" exemptions that apply only to individual documents; thus, courts require an indexed listing of the requested documents because "[w]hen the Government makes a general allegation of exemption, the court may not know if the allegation applies to all or only a part of the information." *Id.* at 820. In contrast, Privacy Act Exemption (*j*) applies to whole systems of records. The only requirements are that the agency's principal function be law enforcement, that the system of records be compiled

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[5] Avalon's affidavit in Wentz's case states:

> I hereby certify that each and every reference to the Plaintiff found in DEA records systems is subject to exemption (j)(2) of the Privacy Act (5 USC 552a) and further, that said references are contained in criminal investigatory files which are located in a system of records that has been properly exempted as published in the Department of Justice Regulations cited at 28 CFR 16.96 et. seq.

R. 14, at 3.

Avalon's affidavit in Shapiro's case is basically the same. See R. 7, at 3.

for the purpose of criminal investigation, and that the agency promulgate regulations exempting the system of records. As already noted, the DEA has met these requirements here. The Privacy Act requires nothing more from an agency seeking the (*j*)(2) exemption.[6] The district court thus properly held that the requested documents are exempt under the Privacy Act.

III. Freedom Of Information Act

Appellants Wentz and Shapiro next argue that they may obtain the requested records under the FOIA. Because their position conflicts with both the statutory language and legislative history of the FOIA and the Privacy Act, we affirm the district court's denial of access under the FOIA as well.

A. Background

Congress enacted the FOIA in 1966. The Act is a general disclosure statute whose purpose is to promote public access to federal government records. Just as the Privacy Act does not allow unlimited access to agency records, the FOIA contains exemptions that allow an agency to withhold records under certain circumstances; these nine "specific" exemptions are listed at 5 U.S.C. § 552(b).

Exemption 3, 5 U.S.C. § 552(b)(3), provides that the FOIA does not apply to information "specifically exempted" by other statutes.[6] The DEA has relied on Exemption

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[5] This conclusion is underscored by the Privacy Act's requirement of *de novo* review and possible *in camera* inspection if an agency invokes a Section (k) "specific" exemption. See 5 U.S.C. 552a(g)(3)(A). There is no such provision for agencies that seek the "general" exemptions in Section (*j*).

[6] 5 U.S.C. § 552(b)(3) provides:

> This section does not apply to matters that are—
>
> * * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such

(Footnote continued on following page)

3 to deny appellants' request. It reasons that because the requested information is exempted from disclosure by the Privacy Act, the information also is unavailable under the FOIA. Wentz and Shapiro contend that the Privacy Act is not an Exemption 3 "statute," and thus the DEA may not use Exemption 3 to deny their request.

The district court held that the Privacy Act is a FOIA Exemption 3 statute. This holding is supported by our decision in *Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). In *Terkel*, we held that the FBI was not required to disclose documents under the FOIA that were exempt from release under Privacy Act Exemption (k): "Although the *Freedom of Information* Act does not contain a comparable exemption, we agree with the lower court that the two statutes must be read together, and that the *Freedom of Information* Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt." *Id.* at 216.

The Fifth Circuit also has held that requesters may not use the FOIA to avoid the Privacy Act nondisclosure provisions. In *Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980), the court specifically held that the Privacy Act is a FOIA Exemption 3 statute. Several recent district court decisions also have held that an agency may not be compelled to disclose information under the FOIA if that information is exempt from disclosure under the Privacy Act. *See Martin v. FBI*, No. 83 C 123 (N.D. Ill. Sept. 30, 1983); *Rachel v. Department of Justice*, No. 83 C 0434 (N.D. Ill. Aug. 1, 1983); *Turner v. Ralston*, 567 F. Supp. 606 (W.D. Mo. 1983); *Anderson v. Huff*, No. 3-82-52 (D. Minn. June 8, 1982); *Heinzl v. Immigration and Naturalization Service*, No. C-80-1210 (N.D. Cal. Dec. 17, 1981).

On the other hand, two circuit courts recently have held that the Privacy Act is not a FOIA Exemption 3 statute. *See Porter v. Department of Justice*, No. 82-1833 (3rd Cir. Sept. 15, 1983); *Provenzano v. Department of Justice*, No. 82-5681 (3rd Cir. Sept. 15, 1983); *Greentree v. U.S. Customs Service*, 674 F.2d 74 (D.C. Cir. 1982).

Appellants urge us to reconsider our holding in *Terkel v. Kelley*, *supra*. Upon close examination of both the statutory language and relevant legislative history, we are persuaded to reaffirm our earlier decision. We hold that the district court correctly decided that the Privacy Act's nondisclosure provisions apply to FOIA requests under FOIA Exemption 3.

B. The Literal Requirements of FOIA Exemption 3

In order to qualify under FOIA Exemption 3, a statute must specifically exempt the requested information from disclosure, and either must "leave no discretion on the issue" of disclosure, or must establish "particular criteria for withholding" or refer to "particular types of matters to be withheld." *See* 5 U.S.C. § 555(b)(3). Privacy Act Exemption (j)(2) clearly meets these requirements. First, its provisions specifically exempt the information requested here. Second, it describes the type of record to be withheld with sufficient specificity to meet the requirement that it refer to "particular types of matters to be withheld." Appellants' argument that Exemption (j)(2) vests too much discretion with the agencies is thus without merit.

Appellants contend that Congress still could not have intended the Privacy Act to be an Exemption 3 statute because nowhere in the legislative history of the Privacy Act or the 1976 proceedings that amended Exemption 3 did Congress refer to the Privacy Act as an Exemption 3 statute. This argument is also without merit, however, because appellants have not shown any congressional statement that the Privacy Act is *not* an Exemption 3 statute.

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6 *continued*

statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Rather, Congress set out specific criteria in Exemption 3, and the Privacy Act meets these requirements.

Appellants also argue that because Privacy Act exemption (*j*) exempts "*any system of records* within the agency from any part of *this* section" (emphasis added), it is limited to the Privacy Act itself, Section 552a. Yet this interpretation would allow a requester to bypass the Exemption (*j*) nondisclosure provision and seek the information through the FOIA instead. For reasons that we outline below in our discussion of Privacy Act Section (b)(2), this result is contrary to clearly stated congressional intent.

C. The Interrelationship of the Privacy Act and the Freedom of Information Act: Privacy Act Section (b)(2)

1. *Statutory Language*

In addition to the argument that the term "this section" at Exemption (*j*) renders the exemption inapplicable to the FOIA disclosure requirements, appellants contend that the Privacy Act Section (b)(2) specifically preserves the FOIA disclosure obligations. Section (b)(2) provides:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
>
> • • •
>
> (2) required under section 552 of this title [FOIA].

5 U.S.C. § 552a(b)(2).

Appellants argue that Section (b) is the provision designed to govern disclosure under the Privacy Act, and because Section (b) is not covered under Privacy Act Exemption (*j*),[7] Congress has exempted the FOIA disclosure

[7] *See supra* note 1.

requirements from Exemption (*j*).[8] For several reasons, however, we cannot accept this interpretation of the interrelationship of these two statutes. First, we disagree with appellants' reading of Section (b). The provisions of Section (b)(1)-(11) all require agency disclosure to a third party requester even though the individual to whom the record pertains has not consented to the disclosure. Yet the introductory language of Section (b) shows that the provisions of (b)(1)-(11) do not apply when the individual consents to disclosure. The language of this opening proviso shows that (b)(2) governs only third party requests for information; where the individual has made a first party request for information pertaining to himself, the FOIA exemption carved out at Section (b)(2) simply does not apply.[9] Section (d) provides sole access for first party requests under the Act.[10]

[8] The court in *Greentree v. U.S. Customs Service*, 674 F.2d 74 (D.C. Cir. 1982), relied on this construction in reaching its conclusion.

[9] This conclusion is supported by the legislative history, which shows that Section (b)(2) was designed to protect third party access to agency records. *See* Subsection C, part 2 of text *infra*.

[10] 5 U.S.C. § 552a(d) provides in pertinent part:

> Each agency that maintains a system of records shall—
>
> (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;
>
> (2) permit the individual to request amendment of a record pertaining to him and—

(Footnote continued on following page)

2. Legislative History

Second, appellants' position would result in an extensive lation of Privacy Act Exemption (j)(2) that would be inconsistent with clearly articulated congressional intent. According to appellants' interpretation, any requester could use the FOIA to force an agency to disclose information even when that information is specifically exempt from disclosure under Exemption (j). The scope of Exemption (j) thus would be limited to the scope of any applicable FOIA exemptions. This limitation on Exemption (j) is contrary to the intent of Congress, however, as shown both by the exemption's language, which is broader than the FOIA exemption covering law enforcement records (Exemption 7), and by the relevant legislative history of the Privacy Act.

The legislative history reveals Congress' special concern that individuals not be permitted access to certain records containing information about their own criminal investigations. In its report on the Senate version of the Privacy Act, the Senate Government Operations Committee observed that law enforcement agencies often maintain files with "highly sensitive and usually confidential information collected by law enforcement officers in anticipation of criminal activity"; the report concluded that "it would not be appropriate to allow individuals to see their own intelligence or investigative files." S. Rep. No. 93-1183, 93d Cong., 2d Sess., at 23 (1974).

The House of Representatives Government Operations Committee report commented on the House version's exemption from disclosure for Central Intelligence Agency and criminal justice records and also concluded: "The Committee believes that such a broad exemption is permissible for these two types of records because they contain particularly sensitive information." H.R. Rep. No. 93-1416, 93d Cong., 2d Sess., at 19 (1974). This congressional concern that first party requesters not be allowed to require agencies to disclose criminal justice records relating to them is supported by Representative Moorehead's explanation of the Privacy Act when the legislation was presented on the House floor: "[e]ach individual shall be given access to his record within the system on his request, with the exception of files related to criminal investigations or national security." 120 Cong. Rec. 36644 (1974), *reprinted in* Legislative History of the Privacy Act of 1974, Source Book on Privacy 893 (1976) (hereinafter Source Book).

Appellants place great emphasis on the original Senate version of the Privacy bill, which contained a provision making the Act's nondisclosure provisions subject to other federal laws and regulations, *see* Section 205(b), S. 3418, Source Book at 163. This provision, they maintain, was included in the final compromise bill as Section (b)(2), and thus shows that Congress intended FOIA access to be unaffected by the Privacy Act nondisclosure provisions.

We cannot accept this interpretation of congressional intent. As noted above, in its final version Section (b)(2) is prefaced by an introductory proviso making it inap-

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[9] *continued*

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

* * *

plicable where an individual requests access to his own records. Where Congress intended to retain provisions in the Senate bill that outlined other aspects of the relationship between the Privacy Act and the FOIA, it did so without qualification. For example, the original Senate version contained a provision that stated that an agency could not use FOIA exemptions to deny disclosure under a Privacy Act request, *see* S. 3418, 93d Cong., 2d Sess. § 205(a), *reprinted in* Source Book at 143. The final Act retained this provision in Section (q)[11] without any limiting provisos.[12]

Section (b)(2) apparently was included to guarantee that the access that the press and media enjoyed under the FOIA would not be curtailed by the Privacy Act. The Senate Report explained that an earlier version of Subsection (b)(2) was included in the Privacy bill "to meet the objections of press and media representatives that the statutory right of access to public records and the right to disclosure of government information might be defeated if such restrictions were to be placed on the public and press." S. Rep. No. 1183, 93d Cong., 2d Sess. 71 (1974), *reprinted in* Source Book at 224.

In response to our conclusion that their interpretation would render Privacy Act Exemption (j) virtually meaningless, appellants contend that under their position Exemption (j) would retain some meaning because it would exempt agencies from other requirements of the Act not related to disclosure. For example, an agency

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[11] No agency shall rely on any exemption contained in section 552 [FOIA] of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

5 U.S.C. § 552(a)(q).

[12] The Fifth Circuit relied on this reasoning to hold that the Privacy Act is an Exemption 3 statute. *See Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980).

could rely on Exemption (j) to avoid many of the Section (e) requirements intended to insure that records are collected and maintained accurately. *See* 5 U.S.C. § 552a(e). *See also Greentree, supra*, 674 F.2d at 81.

Although Exemption (j) indeed specifically exempts agencies from complying with certain Privacy Act requirements besides disclosure, it also clearly exempts agencies from the disclosure provision, Section (d). Appellants' interpretation here is valid only if Section (b), to which Exemption (j) does not apply, covers both first party and third party requests. Since we are persuaded that Section (d) alone governs first party access, we must abide by the literal terms of Exemption (j) and hold that it exempts agencies from being required to disclose certain investigatory records to first party requesters.

Our conclusion is fortified by the legislative history of the Act. As we have noted, Congress expressed its concern that individuals not use the Act to gain access to sensitive criminal justice records. On the other hand, appellants have shown no examples of congressional concern that agencies be allowed to use the Privacy Act exemptions to avoid other Act requirements. We cannot ignore the clearly stated legislative intent and relegate the effect of the Act's exemptions to other provisions that apparently were less important to Congress.

Appellants also argue that various contemporary governmental interpretations of the Privacy Act contradict the government's current position. *See* OMB Report at 40 Fed. Reg. 56742-43 (1975); Justice Department Regulation at 28 C.F.R. 16.57. In response, the government notes that the Justice Department issued a letter several months after the Privacy Act was passed asserting that the Act was the exclusive avenue for first party requests, *see* Source Book at 1177-78, and that the OMB has proposed new guidelines stating that the Privacy Act is an Exemption 3 statute, *see* 48 Fed. Reg. 36359 (1983). These differing interpretations do not help us in our current task. Rather, they show only that government agen-

cies have been confused about the interrelationship between the Privacy Act and the FOIA.

In summary, the legislative history of the Privacy Act shows Congress' concern that individuals not use the Act to obtain access to their own criminal investigative files. It makes little sense to conclude that Congress would enact specific nondisclosure provisions in the Privacy Act to address this concern, while at the same time allowing individuals to bypass these exemptions by using the broader access terms of the FOIA.

3. *Effect of Government's Construction: Full Meaning for Both Acts*

Whereas appellants' interpretation would deprive the Privacy Act access exemptions of any effect beyond the scope of the FOIA exemptions, the government's construction allows both acts to retain their full meaning. On the one hand, agencies could refuse first party requests for the type of information described in Exemption (j), as the DEA did here. At the same time, the FOIA still would retain its vitality. For example, although FOIA Exemption 7 allows greater access to law enforcement data than does Privacy Act Exemption (j) in some instances, the FOIA exemption applies in many cases where the Privacy Act's exemption does not.[13] Exemption 7 governs any

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[13] FOIA Exemption 7 states that:

> (b) This section does not apply to matters that are—
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelli-

(Footnote continued on following page)

third party request, any request for documents that are not "records" within a "system of records," and any first party request for "records" that an agency has not exempted from access according to the Privacy Act's requirements.

Both appellants and the court in *Greentree*, *supra*, 674 F.2d at 79-80, note that the government's construction could result in a "third party anomaly." Because third party requests under the FOIA are protected from the Privacy Act's nondisclosure provisions by Privacy Act Section (b)(2), it is possible that a third party could have access to information about an individual that the individual himself could not obtain.

Merely showing that such an anomaly might exist, however, is not sufficient. The crucial question is whether Congress was aware of this possibility and drafted the Privacy Act to prevent it from occurring. The legislative history does not show that Congress was aware that this "third party anomaly" would arise. The floor managers of the Act explained the amendment that added Section (b)(2) to the Act as follows:

> The compromise amendment would add an additional condition of disclosure to the House bill which prohibits disclosure without written request of an individual unless disclosure of the record would be pursuant to Section 552 of the Freedom of Information Act. This compromise is designed to preserve the *status quo as interpreted by the courts* regarding the disclosure of personal information under that section (the FOIA).

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[13] *continued*

> gence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

5 U.S.C. § 552(b)(7).

Source Book at 861 (Senator Ervin's explanation to Senate), 989 (Representative Moorehead's explanation to House) (emphasis added).

Under the "status quo as interpreted by the courts" at that time, third party requesters enjoyed few rights of access to records concerning other persons. The courts interpreted FOIA Exemption 6, which exempts certain files from access where disclosure would invade personal privacy, very broadly. *See, e.g., White* [*sic*] *Hobby USA, Inc. v. IRS*, 502 F.2d 133 (3d Cir. 1974); *Rural Housing Alliance v. U.S. Dept. of Agriculture*, 498 F2d 73 (D.C. Cir. 1974). Moreover, although Congress had amended FOIA Exemption 7 to expand access to criminal investigative records just before passing the Privacy Act, this was not the "status quo as interpreted by the courts" at that time.

Appellants also have not shown that even today the third party anomaly would arise more than rarely. As we have noted, many first party and third party requests will concern records that are not covered under the Privacy Act at all. Even where a record would be exempt from a first party request because of a Privacy Act exemption, FOIA Exemptions 6 and 7 likely would block the third party request as well.

D. Conclusion

A thorough examination of both the language of the FOIA and the Privacy Act and the relevant legislative history persuades us that the Privacy Act is a "statute" under FOIA Exemption 3. The district court properly held that because the records that Wentz and Shapiro seek are exempt from disclosure under the Privacy Act Exemption (j)(2), they may not be disclosed under a FOIA request. Since Exemption (j)(2) also covers requests for corrections, the denial of Wentz' request for correction of the allegedly inaccurate records also was proper.

Accordingly, the district court's decision granting the DEA's motion for summary judgment is affirmed.

AFFIRMED.

A true Copy:
Teste:

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APPENDIX C

1. The Freedom of Information Act (5 U.S.C. 552) provides:

§ 552. Public information: agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter

reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, in-

terpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and

may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to

the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisons for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is

expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and

procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsi-

ble for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

The Privacy Act (5 U.S.C. 552a) provides:

§ 552a. Records maintained on individuals

(a) Definitions

For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) Conditions of disclosure

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) pursuant to the order of a court of competent jurisdiction.

(c) Accounting of certain disclosures

Each agency, with respect to each system of records under its control shall—

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records

Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements

Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him

contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the sytem;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to

protect against any anticipated threats or hazards to their security or integrity which could result in subst ntial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

(f) Agency rules

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for

whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) Civil remedies

Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failre, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians

For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) Criminal penalties

Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or

by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9) (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal

charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an indentifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied

promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express purpose that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l)(1) Archival records

Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements

of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government contractors

When an agency provides by a contract for the operation by or on behalf of the agency a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(n) Mailing lists

An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Report on new systems

Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

(p) Annual report

The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number

of records contained in any system of records which were exempted from the application of this section under the provisions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section.

(q) Effect of other laws

No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

RESPONDENT'S

BRIEF

(2)

No. 83-1045

In The

Supreme Court of the United States

October Term, 1983

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION,

Petitioners,

vs.

ANTHONY PROVENZANO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No.83-1045

In The

Supreme Court of the United States

October Term, 1983

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION,

Petitioners,

vs.

ANTHONY PROVENZANO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

With the following exceptions or additions, respondent is in general agreement with the Statement in the Petition.

1. At no time during the administrative processing of respondent's FOIA request did the Government ever mention, much less invoke, the argument upon which it now relies; that

access to the requested records was barred because such access was governed by the Privacy Act rather than the FOIA. Indeed, the only indication given to respondent was that his request was 76th on a projected waiting list. Petitioner's present position was not asserted until it filed its Answer in the District Court.

2. The Government's failure to invoke its present argument during the administrative stage of the case was hardly inadvertent. At that time the Government's official policy was reflected in 28 C.F.R. §16.57(b), which reads:

> "Any request by an individual for information pertaining to himself shall be processed solely pursuant to this Subpart D. To the extent that the individual seeks access to records from systems of records which have been exempted from the provisions of the Privacy Act, the individual shall receive, in addition to access to those records he is entitled to receive under the Privacy Act and as a matter of discretion as set forth in paragraph (a) of this section, access to all records within the scope of his request to which he would have been entitled under the Freedom of Information Act, 5 U.S.C. 552, but for the enactment of the Privacy Act and the exemption of the pertinent system of records pursuant thereto."

However, that same regulation provided that release of records beyond those mandated by the Privacy Act is at the sole discretion of the Government. 28 C.F.R. §16.57(a). And in this case the Government, in its brief submitted to the District Court, stated that it was "waiving" 28 C.F.R. §16.57(b) *in this case*.

ARGUMENT

While there clearly exists a conflict among the Courts of Appeal on the issue posed by the Petition, the conflict is not so widespread nor does it have such a serious impact as to warrant review by this Court at this time. Furthermore, the decision below is clearly correct, finding support not only in the language of the statutes involved and in their legislative history, but among commentators and, most importantly, in the interpretation initially made by the Government itself.

Nor is the present case of any more importance[1] or any more significant than *Shapiro v. DEA*, ____ F. 2d ____ (7th Cir. 1983), (App. at 42a-59a)[2] petition for cert. pending, No. 83-5878, in which the petition for certiorari was filed first. Indeed, it is likely that respondent may never in fact gain access to many of his records even under the FOIA.

1. The conflict here involves the Third and District of Columbia Circuits on the one hand, and the Fifth and Seventh Circuits on the other. As the courts noted in both *Porter v. Department of Justice*, 717 F. 2d 787 (3rd Cir. 1983) (App. at 20a)[3] and *Greentree v. U.S. Customs Service*, 674 F. 2d 74, 86 (D.C. Cir. 1982), the Fifth Circuit opinion in *Painter v. Federal*

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1. The Government asserts (Pet. at 10 n. 7) that there are some 58,000 pages of records covered by respondent's request. That figure was never made a part of the record below and its accuracy cannot be challenged by respondent. We suggest, however, that the amount of documents involved can and should have no bearing on whether the case is deemed "important."

2. References are to the Appendix to the Government Petition herein.

3. Respondent shall follow the lead of petitioner in referring to the *Porter* decision which contained the discussion of this entire issue rather than to *Provenzano* which merely incorporated the *Porter* discussion by reference.

Bureau of Investigation, 615 F. 2d 689, 690-691 (5th Cir. 1980)[4], decided the question without any analysis whatsoever, simply citing the earlier Seventh Circuit decision in *Terkel v. Kelly*, 599 F. 2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980), which had likewise decided the issue in a one sentence conclusion, without analysis. 599 F. 2d at 216. The only full, reasoned analyses of the issue are found in *Greentree*, *Porter*, and *Shapiro*.

2. The Government, we suggest, exaggerates the importance of the question to the administration of criminal justice, implying that without guidance from this Court, Government agencies will be unable to determine how to process the thousands of first party requests received each year (Pet. at 11, 12). However, it does not appear that the federal establishment has found an insurmountable obstacle, or even great difficulty, in coordinating implementation of the two statutes over the past eight years. Presumably, the Government has been quite content to process requests under the policy reflected in 28 C.F.R. §16.57(b), set out above, with knowledge that it could still bar access to sensitive information under the eight specific FOIA exemptions, 5 U.S.C. §552(b), covering such matters as law enforcement investigatory records, (b)(7); national security matters, (b)(1); trade secrets, (b)(4) and the like. In fact, judging by the number of opinions cited in the Petition it appears that of the many thousands of first party requests received, 12,516 by the FBI, DEA and Criminal Division *in 1982 alone* (Pet. at 12 n. 10), less than a dozen have required litigation resulting in a written opinion, over all the years involved. Obviously, the issue may be an interesting academic one, but it appears minuscule in its impact upon the administration of justice.

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4. Interestingly, the lower court opinion by Judge Edenfield, set out in full in *Painter*, 615 F. 2d at 689 n. 2, contained a much more complete analysis, though still brief, supporting the view subsequently taken by the *Greentree* and *Porter* decisions.

3. Indeed, it is highly likely that respondent himself will never gain access to many of his records, even under the decision below. The records maintained with reference to respondent are all "investigatory records compiled for law enforcement purposes", §552(b)(7). Thus, on remand the Government would also be able to invoke (as it reserved the right to do) and litigate this specific FOIA exemption 7, in order to bar respondent's access to any truly sensitive documents. Included in that category, for example, would be information revealing the identity of informants or disclosing investigative techniques and procedures (App. at 66a). Thus, as to respondent, the matter is largely a "tempest in a teapot".

4. While a lengthy discussion of the merits of the issue would hardly be appropriate at this juncture, respondent does suggest that the decision below, in *Porter*, as well as that in *Greentree* is correct.

A. We begin by observing that the FOIA is designed to give the citizens of this country wide access to information held by the Government. It reflects a policy of "full disclosure subject only to narrow and well-defined exemptions." *Stretch v. Weinberger*, 495 F. 2d 639, 641 (3rd Cir. 1974). Thus, the Act's disclosure requirements are to be construed broadly and its exemptions narrowly. *Department of the Air Force v. Rose*, 425 U.S. 352, 360-361 (1975); *Soucie v. David*, 448 F. 2d 1067, 1080 (D.C. Cir. 1971). All doubts are to be resolved in favor of disclosure. *Charlotte-Mecklenburg Hospital Authority v. Perry*, 571 F. 2d 195, 200 (4th Cir. 1978). The Privacy Act, on the other hand, is not primarily a disclosure statute, but is intended to regulate the collection, use, dissemination and maintenance of personal information by federal agencies, as a result of the mushrooming growth of the Government's ability to compile information about individuals.

B. As the court below noted, the text of the statutes themselves lend no real support to the Government's position. Sections 552a(j) and 552(k) of the Privacy Act, which authorize agencies to promulgate exemptions for systems of records, both refer to exemptions only "from any part of *this* section." (emphasis added). If Congress had truly intended to authorize the creation of FOIA exemptions by regulation, it would have used language such as "this title" rather than "this section". The plain language refers only to exemptions from the provisions of §552a and not to any other section in Title 5.

In addition, §552a(b)(2) speaks in unmistakably clear language. That section provides that:

> "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be . . . .
>
> (2) required under section 552 of this title".

As the *Greentree* court observed, this section "represents a Congressional mandate that the Privacy Act *not* be used as a barrier to FOIA access." 674 F. 2d at 79 (emphasis in original).

C. A contrary construction would result in a so-called third party anomaly, whereby a third person "might gain access to material under FOIA about an individual unavailable to that individual himself because of Privacy Act section (j)(2)." *Greentree* at 79. The existence of that third party anomaly has been conceded by the Government below (App. at 17a) as well as in this Court

(Pet. at 19). There also exists another potential anomaly. The construction urged by the Government would mean that first party requests could only be processed under the Privacy Act, thus effectively precluded FOIA requests by persons seeking access to records concerning themselves, notwithstanding the absence of any hint that Congress in enacting the Privacy Act or the 1974 FOIA amendments (Pet. at 3), intended such a result. While the Government urges that the existence of such anomalies is of no significance since there is no indication that Congress was aware of them, respondent suggests that just the contrary conclusion should be drawn, *i.e.*, that Congress had no intention of creating or sanctioning such strange results.

D. While the Government suggests that the decision below runs contrary to settled principles of statutory construction by failing to interpret the two acts so that the exemptions in each retain some meaning (Pet. at 17), the court below found its interpretation to render the two acts "perfectly reconcilable" (App. at 22a). Contray to the Government's assertion, the approach of the *Porter* and *Greentree* courts does not emasculate the Privacy Act exemptions, as also suggested by the court in *Shapiro* (App. at 56a). That view is mistaken since it overlooks the important application of those exemptions to other Privacy Act requirements, such as those, for example, relating to collection of information, §552a(e)(1), (2), (3), (5) and (8), as well as those giving individuals rights relating to correction of erroneous data, §552a(d). In those respects the Privacy Act exemptions retain full force and meaning. As the court noted in *Porter*, the Government's view of §552a(d) would amount to a *pro tanto* repeal of the FOIA by implication, since there is nothing expressly stated to that effect in the statute. That position, however, runs contrary to an equally settled rule of construction that "repeals by implication are not favored", *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976) (App. at 22a).

E. The legislative history also supports the conclusion that the Privacy Act was not intended as an exclusive means of first party access to records, although the matter is concededly not without ambiguity. The Privacy Act and the 1974 amendments to the FOIA were passed almost contemporaneously, and the FOIA was again amended some two years after the Privacy Act was passed. It is difficult to understand why the Congress in 1974 would have gone through so much labor to amend FOIA exemption 1 (classified information) and exemption 7 (law enforcement records) if those exemptions were to be rendered meaningless in a large percentage of cases by Privacy Act exemptions for entire systems of records enacted only a few weeks earlier, particularly without any statement of congressional intent to accomplish such a drastic result.

As the court below concluded, in agreement with *Greentree*, 674 F. 2d at 81, the final version of the Privacy Act reflects the culmination of a distinct and ultimately successful effort to keep the exemptions of the two statutes separate and distinct (App. at 23a-24a). The Government points to nothing in the legislative history which directly supports its position. As the court below noted, a careful search reveals no such intention of a repeal by implication and thus fails to overcome the presumption against such a repeal (App. at 24a).

F. A variety of sources have construed the question in issue as respondent suggests. First, legal scholars have uniformly supported the position that the Privacy Act is not an FOIA Exemption 3 statute. *See Greentree*, 674 F. 2d at 87 n. 29, where the authorities are collected. Second, the Office of Management and Budget, the agency responsible for developing guidelines and regulations for implementation of the Privacy Act, issued guidelines clearly consistent with respondent's position (App. at 24a-25a). To the same effect is the analysis of the Privacy Protection Study Commission, established by section 6 of the

Privacy Act. In addressing the issue presented here, the Commission noted that an individual might be able "to obtain much broader access" if he requested information under the FOIA rather than under the Privacy Act with its "systems of records" exemption. *Report of Privacy Protection Study Commission*, App. 4 at 37 (1977). Finally, "the predominant government policy since initial implementation . . . has been to allow an individual to seek access to information about himself through both the Privacy Act and FOIA." *Greentree* at 85. Indeed, in accordance with that policy the Government took precisely the opposite approach before the District Court in *Greentree* only to reverse its position on appeal. As we have previously noted, that policy, reflected in 28 C.F.R. §16.57(b), was still in effect when the Government raised no objection to respondent's initial FOIA request in 1978.

G. FOIA Exemption 3 adopts the exemptions set forth in certain other "disclosure" statutes, but not just any such statute. It only encompasses a statute which:

> "(A) requires that the matter be withheld from the public in such a manner as to leave no discretion on the issue; or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld".

Exemption 3 was narrowed to its present form[1] as a result of congressional reaction to this Court's decision in *Administrator FAA v. Robertson*, 422 U.S. 225 (1975). The obvious purpose for narrowing section (b)(3) was to prevent the loss, through vague, open-ended exemptions in other statutes, of rights gained through enactment of the FOIA. We submit that in its broad exemption

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1. The prior version broadly exempted any documents "specifically exempted from disclosure by statute."

for "systems of records", including a system as extensive as the FBI Central Records System, the Privacy Act simply does not meet the criteria of an Exemption 3 statute. It gives agency heads broad, unfettered discretion to exempt systems of records and totally fails to establish particular criteria for such withholding. If a particularization as broad as the FBI Central Records System can, by agency fiat, be brought within (b)(3), then it is impossible to conceive of an exemption which would not come within the statute, thereby totally emasculating the FOIA. Thus, if Congress' attempt in narrowing (b)(3) to reserve for itself the ability to exempt documents from FOIA disclosure is to have any meaning at all, it certainly must mean that the Privacy Act is not a (b)(3) statute.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for a writ of certiorari be denied.

Respectfully submitted,

HARVEY WEISSBARD
Attorney for Respondent

REPLY

BRIEF

(2)

No. 83-1045

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

ANTHONY PROVENZANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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Solicitor General
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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1045

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

ANTHONY PROVENZANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

Respondent concedes (Br. in Opp. 3) that there is a clear conflict among the circuits on the question presented in the petition. Nonetheless, he urges the Court not to grant the petition because (1) the government did not present its legal arguments at the administrative level (Br. in Opp. 1-2); (2) the issue is not sufficiently important to warrant review (Br. in Opp. 4); and (3) many of the records sought by respondent may be exempt from disclosure under FOIA exemptions other than Exemption 3, which, we have argued, incorporates the withholding provisions of the Privacy Act and bars release of any records pertaining to respondent (Br. in Opp. 5). Respondent's arguments are without merit.

1. As we noted in the petition (at 6-7), because of a substantial backlog of records requests, the Criminal Division of the Department of Justice was unable to process respondent's FOIA request before respondent filed his action in district court seeking release of his records. Similarly, the Federal Bureau of Investigation did not process the documents and administratively deny respondent's FOIA request prior to commencement of this suit (see C.A. App. 41a-43a). Because of the delays in processing respondent's requests, the government had no occasion to raise its legal argument against disclosure at the administrative stage.

Moreover, even if the government had had an opportunity to raise Privacy Act Exemption (j)(2) and FOIA Exemption 3 as grounds for nondisclosure at the administrative level and failed to do so, that would not bar the government from raising this argument in court. Both the FOIA and the Privacy Act provide for de novo review by the district court of an agency decision to withhold records. See 5 U.S.C. 552(a)(4)(B); 5 U.S.C. 552a(g)(3)(A). In light of these provisions, any failure by an agency to raise a particular reason for withholding at the administrative level is of no consequence, because the district court must decide on the basis of the arguments presented in court whether nondisclosure is appropriate under the law. See *Mead Data Central, Inc.* v. *Department of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977); *Illinois Institute for Continuing Legal Education* v. *Department of Labor*, 545 F. Supp. 1229, 1236 (N.D. Ill. 1982).

2. In support of his assertion that, despite the conflict among the circuits, the question presented does not warrant review, respondent cites (Br. in Opp. 2, 4) a Department of Justice regulation (28 C.F.R. 16.57) that states that, in its discretion, the Department will generally provide the fullest possible access under both the FOIA and the Privacy

Act. Respondent appears to contend that, because the Department has rarely chosen to waive this policy, the issue at stake must be unimportant.

Respondent's claim is mistaken for two reasons. First, although possibly few in number, cases such as this one, involving requests for many thousands of pages of documents, do arise. If the government prevails here, it may save considerable agency resources in such cases by making full FOIA processing unnecessary.

Second, the Department of Justice has proposed rescinding the regulation cited by respondent. See 48 Fed. Reg. 35892-35903 (1983). Thus, the Department's past practice with respect to processing first party requests is irrelevant. If the regulation were to be rescinded and this Court were to agree with our argument that Privacy Act Exemption (j)(2) is a withholding statute within the meaning of FOIA Exemption 3, the administrative burden on federal law enforcement agencies of processing the many thousands of first party FOIA requests received annually from federal prisoners such as respondent would be considerably lightened.

3. The fact, alluded to by respondent (Br. in Opp. 5), that many of the records he has requested may eventually be held nondisclosable on the basis of a FOIA exemption other than Exemption 3 is not a valid reason for declining review. Indeed, this Court on several occasions has granted certiorari in the face of identical arguments. See *CIA* v. *Sims*, cert. granted, No. 83-1075 (Mar. 5, 1984); *Department of State* v. *Washington Post Co.*, cert. granted, No. 82-1925 (Oct. 3, 1983); *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975). Regardless of the possible availability

of other FOIA exemptions, it is important to resolve the threshold argument that Privacy Act Exemption (j)(2) and FOIA Exemption 3 bar disclosure. If this argument is accepted, it would obviate the need to examine the applicability of specific FOIA exemptions to each of the requested records.[1]

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

MARCH 1984

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[1]Respondent suggests (Br. in Opp. 3) that the instant petition should be denied because the Court may resolve the issue in *Shapiro* v. *DEA*, petition for cert. pending, No. 83-5878. As we noted in our response in *Shapiro*, however, there is a substantial question whether one of the petitioners in that case is entitled to proceed in forma pauperis. Accordingly, we have suggested that the Court defer disposition of the petition in *Shapiro* pending its disposition of the instant petition.

JOINT APPENDIX

No. 83-1965

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES DEPARTMENT OF JUSTICE,
WILLIAM FRENCH SMITH, ATTORNEY GENERAL
OF THE UNITED STATES, AND WILLIAM H. WEBSTER,
DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION,
PETITIONERS

v.

ANTHONY PROVENZANO

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF APPENDIX

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PETITION FOR CERTIORARI FILED ON
DECEMBER 23, 1983
CERTIORARI GRANTED ON APRIL 2, 1984

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* The opinions of the district court and the court of appeals are printed in the appendices to the petition for a writ of certiorari and have not been reproduced.

DOCKET ENTRIES

12-7-81	1	Complaint, filed 12-4-81.
12-7-81	2	Motion and Clerk's Order for special service as to defendant United States Department of Justice, filed. Notice mailed.
12-7-81		Summons issued (30)
12-7-81	3	Notice of allocation and assignment, filed (Newark-Meanor)
12-16-81	4	Copy of Summons with Affidavit of Service of Summons And Complaint upon U.S. Attorney of December 10, 1981, filed 12-14-81.
1-25-82	5	Stipulation and Order extending time for defendants to answer the complaint to 2-17-82, filed 1-25-82. (Meanor) Notice Mailed.
2-17-82	6	Summons returned served on the U.S. Attorney General, William French Smith and on William H. Webster, Director of the FBI, on 1-13-82, filed 2-16-82.
2-18-82	7	Answer, filed 2-17-82.
3-2-82	8	Notice of Appearance of counsel for defendant, filed 3-1-82.
5-17-82	9	Substitution of counsel for defendant, filed 5-14-82.
5-21-82	10	Order of re-assignment to Judge Fisher, filed 5-20-82. (Fisher) Notice mailed.
6-8-82	11	Notice of motion by plaintiff for summary judgment ret. 6-28-82, filed (Brief submitted)
6-8-82	12	Affidavit of service of notice of motion by plaintiff for summary judgment, filed.
6-21-82	13	Application of defendants for an extension of time to respond to plaintiff's motion for summary judgment, filed 6-18-82.
6-22-82	14	Order directing defendants to respond to plaintiff's motion for summary judgment by July 16, 1982 and postponing plaintiff's motion for summary judgment to July 26, 1982, filed 6-21-82. (Fisher) Notice mailed.
7-19-82	15	Notice of motion by defendants for summary judgment dismissing action ret. 9-27-82, filed 7-16-82. (Brief submitted)
7-19-82	16	Declaration of Douglas S. Wood, filed 7-16-82.
7-19-82	17	Affidavit of James C. Felix, filed 7-16-82.

7-23-82	18	Order adjourning motion of plaintiff for summary judgment to 9-27-82 and adjourning pretrial conference sine die, filed 7-22-82. (Fisher) Notice mailed.
9-27-82		At call for hearing on motion by the plaintiff for summary judgment, the court indicated matter to be decided pursuant to Rule 78. (Fisher) (9-24-82)
9-27-82		At call for hearing on motion of defendants for summary judgment dismissing the action, the court indicated matter to be decided pursuant to Rule 78. (Fisher) (9-24-82)
10-8-82	19	Opinion, filed 10-7-82. (Fisher) (granting defendants' motion for summary judgment) (Copy to NJLJ)
10-19-82	20	Notice of submission of Order denying motion of plaintiff for summary judgment, etc., filed 10-18-82.
10-19-82	21	Order denying motion of plaintiff for summary judgment, granting motion of defendant for summary judgment and dismissing action without cost, filed 10-18-82. (Fisher) Notice mailed.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil No.

ANTHONY PROVENZANO, PLAINTIFF,

v.

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, DEFENDANTS.

COMPLAINT

The plaintiff, by his attorneys, respectfully alleges:

1. This action is brought pursuant to the Freedom of Information Act, 5, U.S.C. § 552, as amended, to require the defendants to permit access to certain records in their possession.

2. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B).

3. Plaintiff Anthony Provenzano ("Provenzano"), also sometimes known as "Tony Pro", is a resident of the State of New Jersey.

4. Defendant Department of Justice is an agency of the United States which has possession, in its Criminal Division, of records to which plaintiff seeks access.

5. Defendant, William French Smith ("Smith"), is the Attorney General of the United States and presides over the defendant Department of Justice.

6. Defendant William H. Webster is the Director of the Federal Bureau of Investigation.

7. By letter dated April 11, 1978, to agents of defendant, Department of Justice, plaintiff, by his attorneys, requested a copy of all files in the possession and custody and under the control of the defendant Department of Justice

pertaining to him or which mention his name. A true copy of said letter is annexed hereto as *Exhibit A*.

8. By letter dated April 11, 1978, to William H. Webster, Director of the Federal Bureau of Investigation, plaintiff, by his attorneys, requested a copy of all files in the possession and custody and under the control of the defendant, William H. Webster, pertaining to him or which mention his name. A true copy of said letter is annexed hereto as *Exhibit B*.

9. By letter dated April 20, 1978, defendant Department of Justice responded to these requests, stating that said requests were procedurally deficient and directing changes in the form of application. A true copy of the said letter is annexed hereto as *Exhibit C*.

10. By letter dated April 24, 1978, plaintiff, by his attorneys, complied with the directions of said defendant Department of Justice and made his request in proper form. A true copy of said letter is annexed hereto as *Exhibit D*.

11. By letter dated May 9, 1978, defendant Department of Justice requested further information for the alleged purpose of clarifying or establishing the identity of plaintiff. A true copy of said response is annexed hereto as *Exhibit E*.

12. By letter dated May 16, 1978, plaintiff, by his attorneys, supplied further information and demanded that said defendant comply with the provisions of 5 U.S.C. § 552(a)(6)(A) within the time limit therein mandated. A true copy of said response and demand is annexed hereto as *Exhibit F*.

13. Said defendant has not responded to said demand and the period of ten working days within which response was to be made has long since expired; nor has any request been made for any extension of time to respond.

14. By letter of July 24, 1980, plaintiff appealed from the failure of the defendant, Department of Justice to respond to his requests as aforesaid, and by letter of August 25, 1980, the defendant, Department of Justice, stated that plaintiff could treat its inability to comply with his demand as a denial of his appeal. A true copy of that letter is annexed hereto as *Exhibit G*.

15. Plaintiff has exhausted his administrative remedies.

16. Pursuant to 5 U.S.C. § 552(a)(3), plaintiff is entitled to access to the requested records, and there is no legal basis for defendants' failure to respond to plaintiff's demand, in proper form, for access thereto, or to deny access thereto, which is the practical effect of defendants' failure to respond to plaintiff's demand.

WHEREFORE, the plaintiff prays that this Honorable Court:

a. Order defendants to respond to plaintiff's request and to produce the requested documents to him for inspection and copying;

b. Order an expeditious completion of the proceedings as provided by 5 U.S.C. § 552(a)(4)(D);

c. Award plaintiff his costs and disbursements in this action as provided by 5 U.S.C. § 522(a)(4)(E); and

d. Grant such other and further relief as the Court shall deem just.

/s/ Harvey Weinbard

HARVEY WEINBARD
Attorney for plaintiff,
Anthony Provenzano

EXHIBIT A
LETTER DATED APRIL 11, 1978

April 11, 1978

Mr. Griffin Bell
United States Attorney General
United States Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Re: *Anthony Provenzano a/k/a Tony Pro*

Dear Mr. Bell:

Please be advised that I am the attorney for Anthony Provenzano a/k/a Tony Pro. This is a request under the Freedom of Information Act as amended (5 U.S.C. § 552).

On behalf of Mr. Provenzano, I hereby request a copy of all files in the United States Department of Justice indexed or maintained under Anthony Provenzano a/k/a Tony Pro and all documents containing his name. To assist you in your search, I have indicated my client's Social Security number, date and place of birth, and present and past resident addresses.

As you know, the amended act provides that if some parts of a file are exempt from release, "reasonably segregable," portions shall be provided. I, therefore, request that if you determine that some portions of the requested information are exempt, you provide me immediately with a copy of the remainder of the file. I, of course, reserve my client's right to appeal and, or, litigate any such decisions.

If you determine that some or all of the requested information is exempt from release, I would appreciate your advising me as to which exemptions you believe cover the information which you are not releasing.

I have enclosed herein a consent form in which my client personally indicates that he desires this information pursuant to the provisions of the Freedom of Information Act.

If you have any questions regarding this request, please do not hesitate to contact me. As provided for in the amended act, I will expect to receive a reply within the next ten business days.

Very truly yours,
GERALD L. SHARGEL.

GLS:ca
Encl.

Client's Social Security No.: 160-12-5057
Date of Birth: May 7, 1917
Place of Birth: New York City
Residences: 47 Lockwood Place
Clifton, New Jersey (since 1956)
643 Palm Drive
Hallendale, Florida (1 yr.)

EXHIBIT B
LETTER DATED APRIL 11, 1978

April 11, 1978

Mr. William H. Webster
Director
Federal Bureau of Investigation
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Re: *Anthony Provenzano a/k/a Tony Pro*

Dear Mr. Webster:

Please be advised that I am the attorney for Anthony Provenzano a/k/a Tony Pro. This is a request under the Freedom of Information Act as amended (5 U.S.C. § 552).

On behalf of Mr. Provenzano, I hereby request a copy of all files in the Federal Bureau of Investigation indexed or maintained under Anthony Provenzano a/k/a Tony Pro and all documents containing his name. To assist you in your search, I have indicated my client's Social Security number, date and place of birth, and present and past resident addresses.

As you know, the amended act provides that if some parts of a file are exempt from release, "reasonably segregable," portions shall be provided. I, therefore, request that if you determine that some portions of the requested information are exempt, you provide me immediately with a copy of the remainder of the file. I, of course, reserve my client's right to appeal and, or, litigate any such decisions.

If you determine that some or all of the requested information is exempt from release, I would appreciate your advising me as to which exemptions you believe cover the information which you are not releasing.

I have enclosed herein a consent form in which my client personally indicates that he desires this information pursuant to the provisions of the Freedom of Information Act.

If you have any questions regarding this request, please do not hesitate to contact me. As provided for in the amended act, I will expect to receive a reply within the next ten business days.

Very truly yours,
GERALD L. SHARGEL

GLS/ca
Encl.

Client's Social Security No.: 100-12-5957
Date of Birth: May 7, 1917
Place of Birth: New York City
Residences: 47 Lockwood Place
Clifton, New Jersey (since 1956)
643 Palm Drive
Hallendale, Florida (1 yr.)

EXHIBIT C
LETTER DATED APRIL 20, 1978

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

April 20, 1978

Mr. Gerald L. Shargel
Fischetti & Shargel
Attorneys at Law
1290 Avenue of The Americas
New York, New York 10019

Re: Anthony Provenzano a/k/a Tony Pro

Dear Mr. Shargel:

Your request for access to records of the Department of Justice under the Privacy Act of 1974 is herewith returned as it cannot be processed in its present form by this office for the reason(s) indicated below:

X__ Title 28 of the Code of Federal Regulations, Section 16.41(a) specifies that such requests are to be addressed to the System Manager or other designated person, as identified in the "Notice of Records Systems" published in the FEDERAL REGISTER by the National Archives and Records Service, GSA. Please review the enclosed Form DOJ-392, List of Department of Justice Components, Functions, Records Maintained, and Systems Managers, determine which component(s) is/are most likely to maintain the records you seek, indicate the(se) component(s) and return your request to the component address(es) indicated on the form.

X__ Title 28 of the Code of Federal Regulations, Section 16.41(b) (2) and (3) prescribes the requirement to verify the identity of persons submitting Privacy Act requests by mail. Please complete the appropriate section(s) of the enclosed Form DOJ-361 and return it with your request to the component address(es) on the enclosed Form DOJ-392, List of Department of Justice Components, Functions, Records Maintained, and Systems Managers.

___ Title 5 of the United States Code, Section 552a(b) prescribes the requirement for persons requesting records

under the Privacy Act of 1974 on behalf of another person to furnish written authorization from that person for the release of the information. Please obtain this authorization and return it with your request.

If further assistance is required, please feel free to contact this office, telephone (202) 739-4256.

Sincerely,

/s/ Robert M. Yahn

Chief, Records Administration Section
Administrative Programs Management Staff
Office of Management and Finance

Enclosures:
As indicated above

EXHIBIT D
LETTER DATED APRIL 24, 1978

April 24, 1978

Assistant Attorney General
Criminal Division
Department of Justice
Washington, D.C. 20530

Re: *Anthony Provenzano a/k/a "Tony Pro"* (PRIVACY ACT REQUEST)

Dear Sir:

Please be advised that I am the attorney for Anthony Provenzano a/k/a "Tony Pro." This is a request under the Freedom of Information Act as amended (5 U.S.C. § 552).

On behalf of Mr. Provenzano, I hereby request a copy of all files in the Criminal Division of the United States Department of Justice indexed or maintained under Anthony Provenzano a/k/a "Tony Pro," and all documents containing his name. To assist you in your search, I have enclosed Form DOJ-361.

As you know, the amended act provides that if some parts of a file are exempt from release, "reasonably segregable," portions shall be provided. I, therefore, request that if you determine that some portions of the requested information are exempt, you provide me immediately with a copy of the remainder of the file. I, of course, reserve my client's right to appeal and, or, litigate any such decisions.

If you determine that some or all of the requested information is exempt from release, I would appreciate your advising me as to which exemptions you believe cover the information which you are not releasing.

If you have any questions regarding this request, please do not hesitate to contact me. As provided for in the amended act, I would expect to receive a reply within the next ten business days.

Very truly yours,
GERALD L. SHARGEL

GLS/ca
Encl.

EXHIBIT G
LETTER DATED AUGUST 25, 1980

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE ASSOCIATE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

Gerald L. Shargel, Esquire
1370 Avenue of the Americas
New York, New York 10019

Dear Mr. Shargel:

This responds to your letter of July 24, 1980, in which you appealed on behalf of your client, Anthony Provenzano, from the failure of the Criminal Division to respond to his request for access to records pertaining to himself.

I have been advised by personnel of the Criminal Division that Mr. Provenzano's request is now number 76 on the project list, and that it will be approximately 25 months before his request is processed. Although the Act authorizes you to treat the failure of the Criminal Division to act on your request within the specified time limit as a denial thereof, this Office, because it lacks the personnel resources to conduct the record reviews that are necessary to make initial determinations on requests for records, cannot act until there has been an initial determination by the component. Our function is limited to the review of those records to which access is in fact denied. If you are dissatisfied with the substantive action of the Criminal Division on your request, simply advise this Office of that fact, and we will then open an appeal on the merits.

You may, if you choose, treat our letter as a denial of your appeal and bring action in an appropriate federal court. We hope that, in making a decision, you will give sympathetic consideration to the fact that the Department of Justice has many requests pending at this time and is making every possible, reasonable effort to process them.

Sincerely,

JOHN H. SHENEFIELD
Associate Attorney General

BY: Richard L. Huff

RICHARD L. HUFF, Acting Director
Office of Privacy and Information Appeals

RLH/MAI:YPR

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

Civil Action No. 81-3767

ANTHONY PROVENZANO, PLAINTIFF

v.

UNITED STATES OF AMERICA,
DEPARTMENT OF JUSTICE, DEFENDANT.

DECLARATION OF DOUGLAS S. WOOD

I, Douglas S. Wood, declare the following to be true and correct:

(1) I am an attorney in the Office of Legal Support Services of the Criminal Division of the Department of Justice. My specific assignment at the present time is Chief of the Freedom of Information Act and Privacy Act Unit.

(2) In such capacity, my duties are, *inter alia:* to act as a liaison with other Divisions and Offices of the Department of Justice in responding to requests made under both the Freedom of Information Act (5 U.S.C. 552), and the Privacy Act of 1974 (5 U.S.C. 552a); to receive requests under these Acts which are referred to the Criminal Division by the Administrative Programs Unit of the Justice Management Division and other units of the Department; to supervise the search and location of records, and the review of those records, and the preparation of the Criminal Division's responses to requesters; to assure that determinations to withhold or to release records of the Criminal Division are in accordance with the provisions of both the Freedom of Information Act and Privacy Act, and the Department of Justice regulations implementing these Acts (28 C.F.R. 16.1 *et seq.* and 28 C.F.R. 16.40 *et seq.*); and to maintain copies of correspondence related to requests which have been referred to the Criminal Division for processing. As Chief, I have been delegated authority to deny

or release records requested under the Freedom of Information Act and the Privacy Act.

(3) The statements made herein, I declare on the basis of knowledge acquired through the performance of my official duties.

(4) A request for "all files in the Criminal Division of the United States Department of Justice indexed or maintained under Anthony Provenzano a/k/a 'Tony Pro'" was received in proper form by the FOIA/PA Unit on May 22, 1978. Pursuant to that request a search was undertaken of the Privacy Act "systems of records" designated by Mr. Provenzano. *See* 5 U.S.C. 552a(a)(5).

(5) As a result of this search it was determined that records within the scope of Mr. Provenzano's request were contained in: JUSTICE/CRM-001, Central Criminal Division Index File and Associated Records; JUSTICE/CRM-002, Criminal Division Witness Security file; JUSTICE/CRM-003, File of Names Checked to Determine if Those Individuals have been the Subject of an Electronic Surveillance; JUSTICE/CRM-010, Organized Crime and Racketeering Information System; JUSTICE/CRM-012, Organized Crime and Racketeering Section, General Index File and Associated Records; JUSTICE/CRM-014, Organized Crime and Racketeering Section Intelligence and Special Services Unit, Information Request System, JUSTICE/CRM-019, Requests to the Attorney General for Approval of Applications to Federal Judges for Electronic Interceptions; and JUSTICE/CRM-022, Witness Immunity Records.

(6) These systems of records have all been properly exempted by regulation from, *inter alia*, the Privacy Act's access provision (5 U.S.C. 552a(d) pursuant to 5 U.S.C. 552a(j) (2)). 28 C.F.R. 16.91. JUSTICE/CRM-010 was originally included in this exempting regulation. 41 Fed. Reg. 12647 (1976). It was subsequently dropped from this regulation as a result of the destruction of all records in this system. 44 Fed. Reg. 54046 (1979). Because Mr. Provenzano's request was pending at this time, however, the records in the system relating to him were not destroyed.

I DECLARE under the penalty of perjury that the foregoing is true and correct.

Executed on: JULY 7, 1982

/s/ Douglas S. Wood

DOUGLAS S. WOOD

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action Number 81-3767

ANTHONY PROVENZANO, PLAINTIFF,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL., DEFENDANTS.

AFFIDAVIT OF JAMES C. FELIX

I, James C. Felix, being duly sworn, depose and say as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI), assigned in a supervisory capacity to the Freedom of Information-Privacy Acts (FOIPA) Section, Records Management Division, at FBI Headquarters (FBIHQ), Washington, D.C.

(2) Due to the nature of my official duties, I am familiar with the procedures followed in processing requests received at FBIHQ pursuant to Title 5, United States Code (U.S.C.), Section 552, commonly known as the Freedom of Information Act (FOIA), and Title 5, U.S.C., Section 552a, commonly known as the Privacy Act (PA) of 1974. I am personally familiar with the procedures followed in responding to plaintiff's FOIPA request, as well as the documents of the FBI responsive to his request.

(3) This affidavit addresses the FOIPA request of plaintiff, Anthony Provenzano.

COMMUNICATIONS RELATIVE TO PLAINTIFF'S REQUEST

(4) By letter from Mr. Gerald L. Shargel, attorney for Anthony Provenzano, to Mr. William H. Webster, Director, FBI, dated April 11, 1978, Mr. Shargel requested "a copy of all files in the Federal Bureau of Investigation indexed or maintained under Anthony Provenzano a/k/a Tony Pro and all documents containing his name." (A copy of this

letter is attached hereto and made a part hereof as Exhibit A.)

(5) By letter from the FBI to plaintiff's attorney, dated April 20, 1978, the FBI acknowledged receipt of plaintiff's FOIPA request and advised him that Mr. Provenzano's FOIPA request would be handled according to Federal statutes and regulations. (A copy of this letter is attached hereto and made a part hereof as Exhibit B.)

(6) By letter from the FBI to plaintiff's attorney, dated June 29, 1978, the FBI advised plaintiff that a preliminary review of documents pertaining to his FOIPA request had been conducted and it was determined that processing of those documents could result in charges exceeding $800. Mr. Provenzano was asked to confirm in writing his willingness to pay such fees before processing would begin. (A copy of this letter is attached hereto and made a part hereof as Exhibit C.)

(7) By letter from plaintiff's attorney to the FBI, dated July 5, 1978, Mr. Shargel confirmed plaintiff's willingness to expend such monies in order to obtain compliance with plaintiff's FOIPA request. (A copy of this letter is attached hereto and made a part hereof as Exhibit D.)

(8) By letter from the FBI to plaintiff's attorney, dated July 20, 1978, the FBI advised plaintiff that documents pertaining to his FOIPA request had been located and would be processed for release at the earliest available date. (A copy of this letter is attached hereto and made a part hereof as Exhibit E.)

(9) By letter from the FBI to plaintiff's attorney, dated March 18, 1982, the FBI advised plaintiff that he was the subject of several FBI investigations but all such material was exempt from disclosure pursuant to Subsection (j)(2) of the Privacy Act and Subsection (b)(3) of the Freedom of Information Act. (A copy of this letter is attached hereto and made a part hereof as Exhibit F.)

IDENTIFICATION AND DESCRIPTION OF THE RECORDS WITHIN THE SCOPE OF PLAINTIFF'S REQUEST

(10) Administrative, applicant, personnel, general and investigative files compiled for law enforcement purposes

are maintained in the "FBI Central Records System." This system consists of a numerical sequence of files broken down according to subject matter. The subject matter of a file may relate to an individual, organization, company, publication, or foreign intelligence activity. The Central Records System enables the FBI to maintain, in one centralized location, all information in its possession deemed worthy of retention and acquired in the course of fulfilling its investigative responsibilities. Access to this system is afforded by the FBI's General Indices, arranged in alphabetical order, consisting of approximately 60 million index cards on various subject matters, including names of individuals. The index cards fall into two general categories: "main" index cards and "see" (short for "see references" or "cross-references") index cards. A "main" index card carries the name of the individual, organization, activity, or the like, which is the principal subject of the file contained in the system. A "see" index card bears the name of an individual, organization, activity, or the like, which is referred to in, but is not the main subject of, a file maintained in the system. Furthermore, it should be noted that the FBI does not index all names of individuals contacted or information received during an investigation. Only those names and that information that is considered pertinent, relevant and necessary for future retrieval are indexed. Communications originating at FBIHQ and those received from FBI Field Divisions and sources outside the FBI are directed to the Records Management Division at FBIHQ for their entry into the appropriate file of the Central Records System.

IDENTIFICATION OF FBIHQ RECORDS PERTINENT TO THE PLAINTIFF'S REQUEST

(11) To locate the records requested by plaintiff, a search was instituted of the FBI General Indices to the Central Records System for all "main" index cards identifiable with the plaintiff.

(12) As a result of this search, several "main" files were located at FBIHQ in which the plaintiff was the, or one of the, principal parties of investigative interest. These files are generally described as follows:

(A) Documents relating to plaintiff's involvement in certain "Racketeer Influenced and Corrupt Organizations" investigations.

(B) Documents relating to plaintiff's involvement in a certain "Kidnapping" investigation.

(C) Documents relating to plaintiff's involvement in certain "Anti-Racketeering" investigations.

(D) Documents relating to plaintiff's involvement in certain "Employee Retirement Income Security Act" investigations.

(E) Documents relating to plaintiff's involvement in a certain "Civil Rights" investigation.

(F) Documents relating to plaintiff's involvement in a certain "Accounting and Fraud" investigation.

(G) Documents relating to plaintiff's involvement in certain "Labor Management Relations Act" investigations.

(H) Documents relating to plaintiff's involvement in certain "Labor-Management Reporting and Disclosure Act" investigations.

(I) Documents relating to plaintiff's involvement in a certain "Interstate Gambling Activities" investigation.

(J) Documents relating to plaintiff's involvement in a certain "Interstate Transportation in Aid of Racketeering" investigation.

(K) Documents relating to plaintiff's involvement in a certain "Extortion" investigation.

(L) Documents relating to plaintiff's possible FBI informant potential.

COMMENTS AS TO THE APPLICATION OF PRIVACY ACT EXEMPTION (j)(2) AND FREEDOM OF INFORMATION ACT EXEMPTION (b)(3)

(13) The documents pertaining to the plaintiff were processed under the PA as well as the FOIA. All material in the aforesaid documents was withheld from plaintiff pursuant to the following exemptions of the PA and FOIA, Title 5, U.S.C., Sections 552a and 552:

(A) Material Reporting Investigative Efforts Pertaining to the Enforcement of Criminal Law

Title 5, U.S.C., Section 552a(j)(2), permits the withholding of the records of an agency which performs as its principal function activities pertaining to the enforcement of criminal laws, and which records, inter alia, contain information compiled for the purpose of criminal investigation. The FBI clearly falls within the purview of this statute.

For an agency to exempt a system of records pursuant to Subsection (j)(2), that agency must promulgate rules announcing the exemption. The Central Records system of the FBI was exempted from disclosure under Title 28, Code of Federal Regulations, Section 16.96. Therefore, the investigative records of the FBI, described in paragraph 12, *supra*, are exempt from disclosure under the PA.

(B) Material Specifically Exempted From Disclosure By Statute

Title 5, U.S.C., Section 552(b)(3), allows for the withholding of material specifically exempted from disclosure by independent statute. In this case, the Privacy Act has been determined to be an exempting statute within the meaning of exemption (b)(3) of the FOIA. The Privacy Act establishes particular criteria for withholding and identifies particular types of records to be withheld. After careful consideration of all the material responsive to plaintiff's request, it was determined that this material, in its entirety, is information to which access is foreclosed under the provisions of the Privacy Act, Title 5, U.S.C., Section 552a(j)(2) and the Freedom of Information Act, Title 5, U.S.C., Section 552(b)(3).

(14) Specifically, all withheld documents are part of records compiled for law enforcement purposes and contain information compiled in the course of lawful criminal investigations.

/s/ James C. Felix

JAMES C. FELIX
Special Agent
Federal Bureau of Investigation
Washington, D.C.

Subscribed and sworn to before me this 19th day of April, 1982.

/s/ [illegible]

Notary Public

My Commission expires January 31, 1987.

EXHIBIT A

FISCHETTI & SHARGEL
ATTORNEYS AT LAW

Ronald P. Fischetti
Gerald L. Shargel

1290 Avenue of the Americas
New York, N.Y. 10010
(212) 866-3732

April 11, 1978

Mr. William H. Webster
Director
Federal Bureau of Investigation
10th and Pennsylvania Avenue N.W.
Washington, D.C. 20535

Re: *Anthony Provenzano a/k/a Tony Pro*

Dear Mr. Webster:

Please be advised that I am the attorney for Anthony Provenzano a/k/a Tony Pro. This is a request under the Freedom of Information Act as amended (5 U.S.C. § 552).

On behalf of Mr. Provenzano, I hereby request a copy of all files in the Federal Bureau of Investigation indexed or maintained under Anthony Provenzano a/k/a Tony Pro and all documents containing his name. To assist you in your search, I have indicated my client's Social Security number, date and place of birth, and present and past resident addresses.

As you know, the amended act provides that if some parts of a file are exempt from release, "reasonably segregable," portions shall be provided. I, therefore, request that if you determine that some portions of the requested information are exempt, you provide me immediately with a copy of the remainder of the file. I, of course, reserve my client's right to appeal and, or, litigate any such decisions.

If you determine that some or all of the requested information is exempt from release, I would appreciate your advising me as to which exemptions you believe cover the information which you are not releasing.

I have enclosed herein a consent form in which my client personally indicates that he desires this information pursuant to the provisions of the Freedom of Information Act.

If you have any questions regarding this request, please do not hesitate to contact me. As provided for in the amended act, I will expect to receive a reply within the next ten business days.

VERY TRULY YOURS,
/s/ Gerald L. Shargel
GERALD L. SHARGEL

GLS/ca
Encl.

Client's Social Security No.: 100-12-5957
Date of Birth: May 7, 1917
Place of Birth: New York City
Residences: 47 Lockwood Place
Clifton, New Jersey (since 1956)
643 Palm Drive
Hallendale, Florida (1 yr.)

April 11, 1978

I, ANTHONY PROVENZANO, hereby acknowledge and consent to the request made on my behalf by Gerald L. Shargel, Esq. for all files and documents for information which is disclosable pursuant to the provisions of the Freedom of Information Act.

/s/ Anthony Provenzano

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

On the 11th day of April, 1978, before me personally came and appeared ANTHONY PROVENZANO to me known and known to me to be the individual described in and who executed the foregoing instrument, and who duly acknowledged that he executed the same.

/s/ Patricia A. Gibbons
Notary Public

EXHIBIT B

April 20, 1978

Request No. 64,370

Gerald L. Shargel, Esq.
Fischetti and Shargel
1290 Avenue of the Americas
New York, New York 10019

Re: Anthony Provenzano

Dear Requester:

This is to acknowledge receipt by FBI Headquarters of your recent Freedom of Information-Privacy Acts (FOIPA) request and to advise you of our determination to comply with your request pursuant to Title 5, United States Code, Section 552(a)(6)(A)(i) and other applicable Federal statutes and regulations. Additional information, if needed by us in this matter, will be requested of you by separate letter.

A search of the indices to our records will be made in an effort to determine if we have the information you seek. If the search fails to indicate the existence of any record(s) pertaining to the subject matter of your request, you will be notified. In the event the search reveals the existence of any record(s) which may be responsive to your request, it will be retrieved and processed pursuant to the provisions of the FOIPA at the earliest possible date.

Your request has been assigned the number indicated above, which you are requested to use in any further correspondence with this Bureau in this matter.

Very truly yours,

/s/ Allen H. McCreight

ALLEN H. MCCREIGHT, Chief
Freedom of Information-Privacy Acts Branch
Records Management Division

EXHIBIT C

June 29, 1978

Gerald L. Shargel, Esq.
Fischetti and Shargel
1290 Avenue of the Americas
New York, New York 10019

Dear Mr. Shargel:

This is in response to your Freedom of Information-Privacy Acts (FOIPA) request on behalf of your client, Anthony Provenzano.

As a result of a preliminary review of documents pertaining to your request, it is believed that processing of these documents may result in charges in excess of $800. Department of Justice Regulations (Title 28, Code of Federal Regulations, Part 16.46) require notification to a requester when anticipated charges exceed $25. This letter constitutes such notification.

I must caution, however, that your indication of approval and consent to incur such fees will not necessarily result in the entire contents of our records being disclosed to you, since we are guided by the provisions of the Freedom of Information Act (Title 5, United States Code, Section 552) and the Privacy Act of 1974 (Title 5, United States Code, Section 552a) in disclosing material from our records.

Accordingly, before taking action, I will await receipt of written notification from you indicating willingness to pay fees in excess of $800 in connection with the processing of your request.

Your request has been assigned number 64,370 which you are requested to utilize in any correspondence with this Bureau regarding this request.

Sincerely yours,

ALLEN H. MCCREIGHT, Chief
Freedom of Information-Privacy Acts Branch
Records Management Division

EXHIBIT D

July 5, 1978

Mr. Allen H. McCreight, Chief
Freedom of Information-Privacy Acts Branch
Records Management Division
United States Department of Justice
Federal Bureau of Investigation
Washington, D.C. 20535

Re: Freedom of Information-Privacy Acts (FOIPA) Request *on Behalf of Anthony Provenzano—Request #64,370*

Dear Mr. McCreight:

I am in receipt of your letter, dated June 29, 1978, indicating that the costs of processing documents requested on behalf of my client, Anthony Provenzano, will exceed $800. Please accept this letter as notification that we are willing to expend such monies in order to obtain compliance with our request.

I would respectfully ask that this request be processed as expeditiously as possible.

Very truly yours,

/S/ Gerald L. Shargel

GERALD L. SHARGEL

GLS/CA

EXHIBIT E

July 20, 1978

Gerald L. Shargel, Esq.
Fischetti and Shargel
1290 Avenue of the Americas
New York, New York 10019

Dear Mr. Shargel:

This is in further response to your pending Freedom of Information-Privacy Acts request dated July 5, 1978.

Documents pertaining to your request have been located. You may be assured that your request is being handled as expeditiously as possible and that all documents which can be released will be made available at the earliest possible date.

Sincerely yours,

ALLEN H. MCCREIGHT, Chief
Freedom of Informaton-Privacy Acts Branch
Records Management Division

EXHIBIT F

Gerald L. Shargel, Esq.
Fischetti and Shargel
1290 Avenue of the Americas
New York, New York 10019

Re: Anthony Provenzano
FOIPA No. 64,370

Dear Mr. Shargel:

This is in response to your Freedom of Information-Privacy Acts (FOIPA) request on behalf of your client, Anthony Provenzano.

A search of the index to our central records system discloses Anthony Provenzano was the subject of several FBI investigations, none of which are available for release to you.

It has been determined by the Attorney General that requests by individuals seeking information about themselves are governed by the Privacy Act. The records pertaining to Anthony Provenzano are exempt from disclosure under the Privacy Act, Title 5, United States Code (U.S.C.), Section 552a(j)(2), and Title 28, Code of Federal Regulations, Section 16.96.

In addition, those documents responsive to Mr. Provenzano's request were found to be exempt from disclosure in their entirety pursuant to the Freedom of Information Act (FOIA), Title 5, U.S.C., Section 552(b)(3), which allows the withholding of information specifically exempted from disclosure by statute. In this case, tne Privacy Act has been determined to be the exempting statute within the meaning of the FOIA.

If you desire, you may submit an appeal from any denial contained herein. Appeals should be directed in writing to the Assistant Attorney General, Office of Legal Policy (Attention: Office of Information and Privacy), United States Department of Justice, Washington, D.C. 20530, within thirty days from receipt of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA

number assigned to your request so that it may be easily identified.

Sincerely yours,

JAMES K. HALL, Chief
Freedom of Informaton-Privacy Acts Section
Records Management Division

Supreme Court of the United States

No. 83-1045

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS,

v.

ANTHONY PROVENZANO

ORDER ALLOWING CERTIORARI. Filed *April 2, 1984.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Third Circuit* is granted. This case is consolidated with case No. 83-5878, *Alfred B. Shapiro and Gregory J. Wentz* v. *Drug Enforcement Administration*, and a total of one hour is allotted for oral argument.

PETITIONER'S

BRIEF

No. 83-1045

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION,
PETITIONERS

v.

ANTHONY PROVENZANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

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Washington, D.C. 20530
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QUESTION PRESENTED

Whether Exemption (j)(2) of the Privacy Act of 1974, 5 U.S.C. 552a(j)(2), is a withholding statute within the scope of Exemption 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(3), and therefore prohibits an individual from obtaining disclosure of his agency records under the FOIA when access to those records is barred by the Privacy Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1045

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PETITIONERS

v.

ANTHONY PROVENZANO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 717 F.2d 799. The opinion of the court of appeals in *Porter* v. *United States Department of Justice* (Pet. App. 3a-26a), which was decided together with the instant case and portions of which were effectively incorporated by reference in the opinion in this case, is reported at 717 F.2d 787. The opinion on denial of rehearing (Pet. App. 27a-30a) is reported at 722 F.2d 36. The opinion of the district court (Pet. App. 31a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1983, and a petition for rehearing

was denied on November 10, 1983 (Pet. App. 27a-30a). The petition for a writ of certiorari was filed on December 23, 1983, and was granted on April 2, 1984 (J.A. 33). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, and the Privacy Act of 1974, 5 U.S.C. 552a, are set forth in full in an Appendix to this brief, 1a-32a.

STATEMENT

A. The Statutory Framework

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, is a general disclosure statute pertaining to all executive agency records of the federal government, but it contains specific exemptions permitting withholding of certain agency records. These exemptions to disclosure are an integral part of the FOIA and represent "the congressional determination of the types of information that the Executive Branch must have the option to keep confidential." *EPA* v. *Mink*, 410 U.S. 73, 80 (1973). As this Court has observed, "[t]he [FOIA] expressly recognizes • • • that public disclosure is not always in the public interest and consequently provides that agency records may be withheld from disclosure under any one of the nine exemptions defined in 5 U.S.C. § 552(b)." *Baldrige* v. *Shapiro*, 455 U.S. 345, 352 (1982).

The primary FOIA exemption involved in this case is Exemption 3, 5 U.S.C. 552(b)(3).[1] This exemption incorporates into the FOIA other statutes that provide for nondisclosure. Specifically, it exempts from the FOIA material covered by other statutes that either require nondisclosure absolutely or permit an agency not to disclose. In the latter instance, for a statute to qualify under Exemption 3 it must either define particular criteria for withholding or set forth the particular types of matters to be withheld.

The FOIA was enacted in 1966, and was first amended in 1974. At that time, Exemption 7, 5 U.S.C. 552(b)(7), dealing with investigatory records, was narrowed to permit greater disclosure. In 1976, the FOIA was again amended when the Government in the Sunshine Act, 5 U.S.C. 552b, was enacted. This amendment, among other things, altered the text of Exemption 3 to its current form.

2. The Privacy Act, 5 U.S.C. 552a, was enacted in 1974, shortly after the 1974 FOIA amendments. The Act has several different purposes, which include preventing release to third parties of agency information concerning individuals and permitting access by individuals to certain records concerning themselves. By its terms, the Privacy Act applies only to "records," which are agency files or documents about individuals contained within "systems of records." Systems of records are defined by the statute as a group of agency records from which information is retrieved through use of the name of an individual or some other personal identifier.[2] See

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[1] Exemption 3 reads in full:

> This section does not apply to matters that are—
>
> • • • • •
>
> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld • • •.

[2] Thus, if an agency record on a subject is not indexed so that it can be found by use of an individual's name or other personal identifier, the record is not covered by the Privacy

5 U.S.C. 552a(a)(4) and (5). Because of this limitation in the scope of the Privacy Act, the Act concerns only a portion of the material covered by the FOIA.

Section (b) of the Privacy Act, 5 U.S.C. 552a(b), precludes an agency from disclosing to any person any record (within a system of records) regarding an individual without the consent of the subject of the record. However, this section provides a number of exceptions to this general nondisclosure rule; one of these exceptions, contained in subsection (b)(2) (5 U.S.C. 552a(b)(2)), authorizes release of records if disclosure is required by the FOIA.

Section (d) of the Privacy Act, 5 U.S.C. 552a(d), provides the mechanism for access by individuals to records pertaining to themselves. This section, in other words, establishes the method by which a person may obtain any government agency record that can be retrieved from a system of records by use of the individual's name or other personal identifier. See 5 U.S.C. 552a(d)(1). It also permits individuals to request that corrections be made to their records. See 5 U.S.C. 552a(d)(2). Section (d) of the Privacy Act provides an access system for first party requests only.[3]

Through exemptions set out in Sections (j) and (k) of the Privacy Act, 5 U.S.C. 552a(j) and (k), government agencies may limit the scope of an individual's right of access to his own records. Exemption (j) permits the heads of certain agencies to promulgate regulations exempting entire systems of records from access. Thus, if a request is made for a record within an exempted system of records, that record may be withheld without further inquiry. Because of this feature, Privacy Act Exemption (j) is quite unlike the FOIA exemptions, which generally require an agency to comb each requested document and delete only the exact data exempted from disclosure by a specific FOIA exemption.

Privacy Act Exemption (j)(2), 5 U.S.C. 552a(j)(2), provides an exemption for criminal enforcement records kept in a system of records by agencies whose principal function pertains to enforcement of criminal laws. Though not as broad as Exemption (j), Exemption (k) provides exemptions for other records, such as law enforcement investigatory records not covered by Exemption (j)(2), classified documents, and employment testing and personnel information. See 5 U.S.C. 552a(k)(1) through (7).

In addition to providing exemptions from access, the Privacy Act exemptions permit agencies to avoid other specified portions of the Act, including provisions requiring an agency to make an accounting to an individual named in a particular record of disclosures of that record to others (5 U.S.C. 552a(e)(3)) and to give notice regarding agency record collection practices as well as procedures for gaining access to agency records (5 U.S.C. 552a(e)(1), (4)(G) and (H)).

3. The controversy here centers on the relationship between the FOIA, the general statute governing disclosure of all government records, and the Privacy Act, the specific statute covering release of files retrieved through use of an individual's name. If

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Act. *Savarese* v. *United States Department of HEW*, 479 F. Supp. 304, 307 (N.D. Ga. 1979), aff'd, 620 F.2d 298 (5th Cir. 1980), cert. denied, 449 U.S. 1078 (1981).

[3] A request by an individual for his own records is commonly referred to as a "first party request." A request by an individual for another person's records is known as a "third party request." We will use this terminology throughout this brief.

the Privacy Act is a FOIA Exemption 3 statute, its access exemptions are in essence incorporated into the FOIA. As a result, when an individual requester is precluded from access to his own records under the Privacy Act, he would also be precluded from access under the FOIA. In such instances, an agency need only follow the streamlined Privacy Act procedures to determine if the requested records are contained in an exempt system of records.

If, on the other hand, the Privacy Act is not a statute falling within FOIA Exemption 3, a requester can obtain any nonexempt documents under the FOIA, regardless of the Privacy Act. Thus, even if records are excluded from access under the Privacy Act, a requester could avoid this prohibition and attempt to obtain the material simply by invoking the FOIA instead.

B. The Proceedings Below

Respondent Anthony Provenzano is a former officer of Local 560 of the International Brotherhood of Teamsters in New Jersey. The Federal Bureau of Investigation and the Criminal Division of the Department of Justice have voluminous files relating to respondent,* who, during the past 20 years, has been convicted in state courts of murder and extortion, and in federal courts of conspiracy and substantive violations of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. 1962) and conspiracy to pay a kickback to a union pension fund trustee in order to obtain favors on a loan proposal (18 U.S.C. 371, 1954). See *United States* v. *Provenzano*, 620 F.2d 985 (3d Cir.), cert. denied, 449 U.S. 899 (1980); *United States* v. *Provenzano*, 615 F.2d 37 (2d Cir.), cert. denied, 446 U.S. 953 (1980); *United States* v. *Provenzano*, 334 F.2d 678 (3d Cir.), cert. denied, 379 U.S. 947 (1964); *People* v. *Provenzano*, 79 A.D.2d 811, 435 N.Y.S.2d 369 (1980).

*The Criminal Division's files consist of approximately 43,000 pages; the FBI's files consist of more than 15,000 pages.

1. In April 1978, respondent sent requests to the Department of Justice and the FBI for all files and documents indexed under his name, or containing his name (J.A. 6-7, 8-9). Following further correspondence, the FBI notified respondent, in July 1978, that it had located documents covered by his request and would process the request as soon as possible (J.A. 30).

In July 1980, respondent filed an administrative appeal, challenging the failure by the Criminal Division of the Department of Justice to respond substantively to his request (Pet. App. 33a). The Department's Office of Privacy and Information Appeals advised respondent that his request was 76th on the Criminal Division project list, and that it would be some time before the request could be processed (J.A. 13). The Department indicated that if he so chose, respondent could treat this response as a denial of his administrative appeal (J.A. 14).

2. Approximately 17 months later, in December 1981, respondent filed this action in the United States District Court for the District of New Jersey against the Department of Justice and the FBI, seeking an order requiring release of the requested documents under the FOIA.

The government moved for summary judgment, supported by affidavits from Criminal Division and FBI personnel. The affidavits showed that the Criminal Division had searched its files and found records

within the scope of respondent's request in eight Department of Justice file systems.[6] Citing the relevant departmental regulation (28 C.F.R. 16.91), the Criminal Division affidavit stated (J.A. 16) that all of these records systems were by regulation exempt from access under Privacy Act Exemption (j)(2).[8]

[6] Those file systems were described as follows (J.A. 16):

JUSTICE/CRM-001—Central Criminal Division Index File and Associated Records

JUSTICE/CRM-002—Criminal Division Witness Security File

JUSTICE/CRM-003—File of Names Checked to Determine if Those Individuals have been the Subject of an Electronic Surveillance

JUSTICE/CRM-010—Organized Crime and Racketeering Information System

JUSTICE/CRM-012—Organized Crime and Racketeering Section, General Index File and Associated Records

JUSTICE/CRM-014—Organized Crime and Racketeering Section Intelligence and Special Services Unit, Information Request System

JUSTICE/CRM-019—Request to the Attorney General for Approval of Applications to Federal Judges For Electronic Interceptions

JUSTICE/CRM-022—Witness Immunity Records

[8] One system of records concerning respondent, JUSTICE/CRM-010, was originally included in the exempting regulation. See 41 Fed. Reg. 12647 (1976). It was subsequently dropped from the regulation as a result of the destruction of the records within the system. See 44 Fed. Reg. 54046 (1979). Because respondent's request was pending at that time, the records from this system pertaining to him were not destroyed. J.A. 16.

The FBI affidavit stated that the index to the Bureau's Central Records System revealed that respondent had been the subject of a number of FBI investigations (J.A. 20-21).[7] Citing 28 C.F.R. 16.96, the FBI reported that its records on respondent had been exempted by regulation from disclosure under the Privacy Act (J.A. 22).

The government contended that, because the relevant Criminal Division and FBI records were exempt from disclosure under the Privacy Act, they also were exempt from disclosure under the FOIA.

3. The district court granted the government's motion for summary judgment (Pet. App. 31a-41a). The court noted (*id.* at 34a-35a) that the Criminal

[7] The FBI investigation files containing documents pertaining to respondent were described as follows (J.A. 21):

Racketeer Influenced and Corrupt Organization investigations
Kidnapping investigation
Anti-Racketeering investigations
Employee Retirement Income Security Act investigations
Civil Rights investigation
Accounting and Fraud investigation
Labor Management Relations Act investigations
Labor-Management Reporting and Disclosure Act investigations
Interstate Gambling Activities investigation
Interstate Transportation in Aid of Racketeering investigation
Extortion investigation
Informant potential investigation

Division and FBI affidavits indicated that all of the records sought by respondent were contained in systems of records exempted from access by Privacy Act Exemption (j)(2). The court then concluded (Pet. App. 35a-40a) that Exemption (j)(2) is a withholding statute within the meaning of FOIA Exemption 3, and it held that the government had therefore properly declined to release the documents requested by respondent.

4. The court of appeals reversed (Pet. App. 1a-2a), relying on its opinion in the companion case of *Porter* v. *United States Department of Justice*, 717 F.2d 787 (3d Cir. 1983) (Pet. App. 3a-26a).* Initially, the court noted the existence of a conflict among the circuits regarding the relationship between the FOIA and the Privacy Act (Pet. App. 19a-20a). The court explained that the District of Columbia Circuit, in *Greentree* v. *United States Customs Service*, 674 F.2d 74 (1982), had held that a requester may use the FOIA to avoid the Privacy Act access exemptions, and that this position contradicted that taken by the Fifth Circuit in *Painter* v. *FBI*, 615 F.2d 689 (1980), and by the Seventh Circuit in *Terkel* v. *Kelly*, 599 F.2d 214 (1979), cert. denied, 444 U.S. 1013 (1980). The court of appeals found the *Greentree* reasoning persuasive and

*This case was consolidated with *Porter* in the court of appeals for the purpose of oral argument. In *Porter*, the court first held that no first party request had been made, thereby rendering the Privacy Act exemptions inapplicable (Pet. App. 13a-19a). In dictum, the court then discussed the Privacy Act (*id.* at 19a-26a), and it is this part of the *Porter* opinion to which the court referred in its opinion in this case. In describing the court of appeals' ruling in this case, the references in the text are actually to the Privacy Act/FOIA discussion in the *Porter* opinion, set forth at Pet. App. 3a-26a.

adopted it (Pet. App. 20a). (In *Greentree*, the D.C. Circuit had held that subsection (b)(2) of the Privacy Act, which provides an exception to the general rule against disclosure in Section (b) of that Act when the FOIA mandates disclosure, "represents a Congressional mandate that the Privacy Act *not* be used as a barrier to FOIA access" (674 F.2d at 79; emphasis in original).)

The court of appeals then added several of its own observations. It noted that the Privacy Act's access exemptions state that they exempt agencies from the requirements of "this section," and it therefore concluded that the Privacy Act was not meant to have any effect on the FOIA (Pet. App. 21a). The court thus found it unnecessary to analyze the Privacy Act in relation to the criteria of FOIA Exemption 3 (Pet. App. 21a n.11). The court of appeals further determined that there is nothing in the Privacy Act that could be read as supporting an express or implied repeal of the FOIA (*id.* at 21a-22a). Although it did note a "certain amount of ambiguity" in the legislative history of the Privacy Act (*id.* at 22a), the court nonetheless concluded that this history revealed that Congress intended to keep the Privacy Act and FOIA exemptions separate from each other (*id.* at 24a). Accordingly, the court of appeals reversed the district court's judgment and remanded the case to that court for further proceedings (presumably, for the agency to process the requested documents under the FOIA).

The government's petition for rehearing en banc was denied by a 6-4 vote (Pet. App. 27a-28a). In dissent, three judges expressed the view that "[i]t is difficult * * * to believe that in enacting FOIA and the Privacy Act, Congress intended to make it pos-

sible for someone in the position of [respondent] to require that the FBI and the Department of Justice turn over an entire system of records" (Pet. App. 29a). The dissenting judges added that "[a]lthough one of the goals of the Privacy Act is to make material available to first party requesters, a persuasive argument may be made that Exemption Three of [the FOIA] authorizes the government to deny [respondent's] request" (*ibid.*).

5. Shortly after rehearing was denied, the Seventh Circuit, in *Shapiro* v. *DEA*, 721 F.2d 215 (1983), expresly disagreed with the D.C. Circuit's decision in *Greentree* and the court of appeals' decision in this case, and ruled that Privacy Act Exemption (j)(2) is a FOIA Exemption 3 statute. This Court granted the petitions for certiorari in this case and *Shapiro* (No. 83-5878) and ordered the cases consolidated for purposes of oral argument.

SUMMARY OF ARGUMENT

The court of appeals has concluded that, even though the government records respondent seeks are exempt from access under the Privacy Act, respondent nonetheless can attempt to obtain those records under the Freedom of Information Act. The decision below should be reversed because it is contrary to the structure and legislative history of the records disclosure statutes and leads to an anomalous result that negates an important purpose of the Privacy Act access exemptions.

A. The plain language of the statutes establishes that Privacy Act Exemption (j)(2) is a FOIA Exemption 3 withholding statute. Exemption 3 expresly incorporates into the FOIA nondisclosure statutes that leave discretion with an agency, so long

as those statutes limit that discretion by, inter alia, describing the "particular types of matters" an agency may withhold. 5 U.S.C. 552(b)(3)(B). Privacy Act Exemption (j)(2) contains just such a particularized description. It authorizes the heads of certain agencies to deny access to Privacy Act "records" dealing with specifically described law enforcement activities. When the language of Exemption (j)(2) is compared to that of other nondisclosure statutes that have been found to fit the criteria of Exemption 3, the conclusion is inescapable that Exemption (j)(2) qualifies as an Exemption 3 statute.

The court of appeals found it significant that Privacy Act Exemption (j)(2) exempts records from requirements of "this section," rather than "this title." The court took this language to mean that Exemption (j)(2) permits withholding from access under the Privacy Act but not under the FOIA. In reaching this result, the court erroneously assumed that, in order to qualify under FOIA Exemption 3, a withholding statute must contain an express reference to the FOIA. Exemption 3 imposes no such requirement; it incorporates nondisclosure statutes whether or not they refer to the FOIA. Moreover, the court's analysis leads to the implausible conclusion that Congress purposefully made the Privacy Act access exemptions broader than the FOIA exemptions, yet it intended to allow requesters to circumvent those broad Privacy Act exemptions merely by filing a FOIA request.

In addition, there is nothing in Exemption 3 of the FOIA that suggests that Congress meant to exclude the Privacy Act exemptions from its coverage. When Congress enacted the Government in the Sunshine Act (5 U.S.C. 552b), it amended the FOIA to exclude the Sunshine Act exemptions from the scope of FOIA

Exemption 3. Because FOIA Exemption 3 does not similarly exclude the Privacy Act exemptions from its coverage, it is logical to conclude that Congress intended those exemptions to be treated under Exemption 3 like any other withholding statute.

B. This conclusion is confirmed by the legislative history and purpose of Exemption (j)(2). In enacting the Privacy Act, Congress took great care to provide a means for agencies to protect sensitive law enforcement files from disclosure to the subjects of those records. Indeed, the history of the Privacy Act law enforcement records exemptions establishes that Congress deliberately made those exemptions broader than the comparable FOIA exemptions. Specifically, Privacy Act Exemption (j)(2) authorizes any law enforcement agency to exempt from access certain criminal justice records systems in their entirety, thereby excusing the agency from the necessity of justifying nondisclosure on a line-by-line basis for each individual document, as would be required under the FOIA.

This history demonstrates that Congress was aware of the dangers that would flow from disclosure of sensitive law enforcement records, and that it was Congress that made the basic policy decision that criminal justice agencies must have the authority to bar access to such records when necessary. Consequently, even though Exemption (j)(2) leaves disclosure discretion with the agency, it qualifies as an Exemption 3 withholding statute.

C. A contrary interpretation would deprive the Privacy Act access exemptions of any effect beyond the scope of the FOIA exemptions. Yet, as noted above, the legislative history of the Privacy Act clearly establishes that Congress included exemptions in that Act that it intentionally designed to be

broader than the FOIA exemptions. The court of [illegible]als' ruling ignores that clear congressional intent by effectively repealing those portions of the Privacy Act access exemptions that are more expansive than the exemptions in the FOIA.

If, on the other hand, Exemption (j)(2) is regarded as a FOIA Exemption 3 statute, the other FOIA exemptions would still have a significant purpose. Because the Privacy Act applies only to documents that qualify as "records," the Act covers only a fraction of the materials covered by the FOIA. Moreover, the Privacy Act access exemptions are discretionary and apply only to first party requests. Therefore, the FOIA exemptions would continue to govern exclusively with respect to (1) all third party requests; (2) all requests for documents that are not Privacy Act "records"; and (3) all first party requests made under the FOIA for "records," where the agency has not exempted those records from access under the Privacy Act. Thus, unlike the approach of the court of appeals, our interpretation allows both acts to retain their full meaning.

D. The court of appeals nevertheless concluded that subsection (b)(2) of the Privacy Act establishes that requesters like respondent may use the FOIA to override the broad law enforcement access exemptions in the Privacy Act. Subsection (b)(2) provides an exception to the Privacy Act's general rule against disclosure where release of a record is required by the FOIA. The introductory language of Section (b) and the legislative history of subsection (b)(2) make clear, however, that subsection (b)(2) applies only to *third party* requests. Any other reading of subsection (b)(2) would render the Privacy Act exemptions meaningless to the extent that they are broader than the exemptions in the FOIA.

E. The court of appeals also based its ruling on the so-called "third party anomaly" theory. Under this theory, if Exemption (j)(2) is a FOIA Exemption 3 statute with respect to first party requesters, it is conceivable that a third party requester might gain greater access to a record than the subject of the record. This is only a theoretical concern, however, because the FOIA privacy exemptions would likely prevent disclosure of records concerning an individual to a third party. The third party anomaly was especially unlikely to have arisen when the Privacy Act was enacted in 1974, because at that time the FOIA privacy exemptions had been given a broad application by the courts. In any event, there is no evidence that Congress was aware of the possibility of such an anomaly. Accordingly, the court of appeals erred in relying on the third party anomaly theory, which reveals nothing about Congress's intent when it enacted the Privacy Act.

F. Similarly, the court of appeals erred in relying on an interpretation of the Privacy Act prepared in 1975 by the Office of Management and Budget, the lead agency for the Privacy Act. Because the question in this case involves the interaction of both the Privacy Act and the FOIA, the views of the Department of Justice, the lead agency for the FOIA, are also pertinent. Shortly after enactment of the Privacy Act, the Department of Justice took the position that a first party requester could not resort to the FOIA to circumvent the access exemptions of the Privacy Act. Furthermore, after a careful analysis of the language and legislative history of the Privacy Act, OMB recently concluded that the Privacy Act access exemptions are withholding statutes within the meaning of FOIA Exemption 3.

ARGUMENT

PRIVACY ACT EXEMPTION (j)(2) IS A WITHHOLDING STATUTE WITHIN THE SCOPE OF EXEMPTION 3 OF THE FREEDOM OF INFORMATION ACT, AND THEREFORE DOCUMENTS EXEMPT FROM ACCESS UNDER EXEMPTION (j)(2) ARE ALSO EXEMPT UNDER THE FOIA

There is no dispute in this case that all of the law enforcement investigative records sought by respondent are contained within systems of records that have been properly exempted from access pursuant to regulations promulgated under Exemption (j)(2) of the Privacy Act. Thus, it is clear that respondent has no right under the Privacy Act to examine those records. Respondent contends, however, that he may seek those same records simply by filing a request for them under the Freedom of Information Act. It is our submission that the records sought by respondent are exempt from disclosure not only under the Privacy Act but also under the FOIA because Privacy Act Exemption (j)(2) is a withholding statute within the scope of FOIA Exemption 3.

A. Privacy Act Exemption (j)(2) Is A Withholding Statute Within The Literal Language Of FOIA Exemption 3

In deciding whether certain material is exempt from disclosure under the FOIA, the proper starting point is the plain language of the relevant FOIA exemption. *See United States* v. *Weber Aircraft Corp.*, No. 82-1616 (Mar. 20, 1984), slip op. 6. Furthermore, in cases involving Exemption 3 of the FOIA, it is also necessary to examine the language of the statute that is said to constitute a statutory exception to disclosure within the meaning of Exemption 3. *See Baldrige* v. *Shapiro*, 455 U.S. 345, 354-355 (1982).

1. Under FOIA Exemption 3, the FOIA does not apply to matters that are

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . .

To come within Exemption 3, therefore, a statute need not absolutely bar disclosure. It is sufficient if the statute describes with particularity the "types of matters" an agency has discretion to withhold. See *DeLaurentiis* v. *Haig*, 686 F.2d 192, 197 (3d Cir. 1982); *Founding Church of Scientology, Inc.* v. *NSA*, 610 F.2d 824, 827 (D.C. Cir. 1979).

Although Section (d) of the Privacy Act provides generally for first party access to agency records, Exemption (j)(2) describes in detail the "particular types of matters" that agencies have discretion to withhold from such access through regulation. Exemption (j)(2) therefore qualifies as a withholding statute within the meaning of FOIA Exemption 3. See *Shapiro* v. *DEA*, 721 F.2d 215, 219 (7th Cir. 1983), cert. granted, No. 83-5878 (Apr. 2, 1984). Exemption (j)(2) is initially limited because it applies solely to Privacy Act "records," and only to those kept within "systems of records" maintained by an agency that "performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities." 5 U.S.C. 552a (j)(2). Exemption (j)(2) further states that it covers solely records that consist of:

> (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

This detailed description of the material covered by Exemption (j)(2) is more particular than that in numerous other statutes that have been held to be within FOIA Exemption 3. For example, 50 U.S.C. 403(d)(3) provides that the Director of Central Intelligence "shall be responsible for protecting intelligence sources and methods from unauthorized disclosure"—language that can result in the exemption of records generated throughout the CIA. The legislative history of amendments to the FOIA specifically identifies this statute as being among those to which Exemption 3 applies,* and the courts consistently have held the statute to be an Exemption 3 statute on the ground that it refers to "particular types of matters to be withheld." See, *e.g.*, *Halperin*

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* See H.R. Rep. 94-880, 94th Cong., 2d Sess., Pt. II, at 15 n.2 (1976); H.R. Rep. 93-1380, 93d Cong., 2d Sess. 12 (1974); S. Rep. 93-854, 93d Cong., 2d Sess. 16 (1974).

v. *CIA*, 629 F.2d 144, 147 (D.C. Cir. 1980); *National Commission on Law Enforcement* v. *CIA*, 576 F.2d 1373, 1376 (9th Cir. 1978). For the same reason, a similar statute, exempting from disclosure information concerning the "organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency" (Pub. L. No. 86-36, § 6(a), 73 Stat. 64), has been held to be an Exemption 3 statute. See *Founding Church of Scientology, Inc.* v. *NSA*, 610 F.2d at 827-828. A number of other statutes considerably less specific than Privacy Act Exemption (j)(2) have also been held to be covered by FOIA Exemption 3. See, *e.g.*, *Iron & Steel* v. *Dunn*, 606 F.2d 1215, 1219-1220 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980) (35 U.S.C. 122: "[a]pplications for patents" and "information concerning the same"); *Medina-Hincapie* v. *Department of State*, 700 F.2d 737, 742-743 (D.C. Cir. 1983); *DeLaurentiis* v. *Haig*, 686 F.2d at 193 (8 U.S.C. 1202(f): Department of State records pertaining to the "issuance or refusal of visas or permits to enter the United States"); *King* v. *IRS*, 688 F.2d 488, 496 (7th Cir. 1982); *Chamberlain* v. *Kurtz*, 589 F.2d 827, 838-839 (5th Cir.), cert. denied, 444 U.S. 842 (1979) (26 U.S.C. 6103: tax "return information").

2. In short, Exemption (j)(2) "sets forth sufficiently definite standards to fall within the scope of Exemption 3." *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 122 (1980). The court of appeals nonetheless held that Exemption (j)(2) is not a FOIA Exemption 3 statute because Exemption (j) of the Privacy Act authorizes agencies to promulgate regulations exempting agency records "from any part of

this section." The court of appeals reasoned that "[h]ad Congress intended to authorize the creation by regulation of exemptions from the [FOIA] it would have used language such as 'this title' rather than 'this section' " (Pet. App. 21a).

Contrary to the reasoning of the court of appeals, it seems quite obvious that when Congress drafted the Privacy Act exemptions, its primary focus was on limiting access under that Act ("this section"). Thus, Congress enacted Exemption (j) for the specific purpose of barring access to records that otherwise would be made available to the subject of those records under Section (d) of the Privacy Act. The court of appeals appears to have assumed that, in order to qualify under FOIA Exemption 3, a withholding statute must include a specific reference to the FOIA. But Exemption 3 of the FOIA incorporates nondisclosure statutes whether or not they expressly refer to the FOIA. Indeed, most, if not all, of the statutes that have been held to come within Exemption 3 make no reference to the FOIA.

Furthermore, as we discuss in greater detail below (see pages 24-30, *infra*), in drafting the Privacy Act access exemptions, including Exemption (j)(2), Congress took great pains to ensure that these exemptions would be broader in scope than the comparable exemptions in the FOIA. Accordingly, if the court of appeals were correct in concluding that the Privacy Act exemptions are not withholding statutes within the meaning of FOIA Exemption 3, the Privacy Act exemptions would be deprived of one of their principal purposes.

3. Exemption (j)(2) thus satisfies the criteria for withholding statutes set forth in Exemption 3 of the FOIA. Unless FOIA Exemption 3 itself excludes the Privacy Act from its coverage, we submit that Pri-

vacy Act Exemption (j)(2) must be held to constitute a withholding statute under the literal terms of Exemption 3.

In *Painter* v. *FBI*, 615 F.2d 689, 690-691 (1980), the Fifth Circuit noted that following enactment of the FOIA (5 U.S.C. 552), Congress passed two other open records statutes, the Privacy Act (5 U.S.C. 552a) and the Government in the Sunshine Act (5 U.S.C. 552b). The court observed that Congress was obviously "aware of the interplay between these various open records acts, and * * * it specifically indicated when the exemptions of one act should not apply to disclosures mandated by another" (615 F.2d at 691). To illustrate this point, the court noted that, in enacting the Privacy Act, Congress specifically provided, in Section (q), 5 U.S.C. 552a(q), "that no agency could rely on an FOIA exemption to withhold from an individual any record to which that individual would otherwise be entitled under the provisions of the Privacy Act" (615 F.2d at 690). In addition, the court pointed out (*ibid.*) that "when in 1976 Congress enacted the Sunshine Act, it amended [Exemption 3] of the FOIA * * * to specify that exemptions under the Sunshine Act could not be asserted to block disclosure under the FOIA."[*] Because Congress has never expressed any intent to exclude the Privacy Act exemptions from the coverage of FOIA Exemption 3 (as it did with respect to the Sunshine Act), the Fifth Circuit declined to infer any such intent (615 F.2d at 691) and concluded that "material exempted

[*] Exemption 3 of FOIA, as amended in 1976, provides in pertinent part that the FOIA "does not apply to matters that are * * * specifically exempted from disclosure by statute (other than section 552b of this title)" (5 U.S.C. 552(b)(3) (emphasis added)).

from disclosure under the provisions of the Privacy Act are matters 'specifically exempted from disclosure by statute' under [Exemption 3]" (615 F.2d at 691 n.3). Thus, the fact that Exemption 3 does not expressly exclude the Privacy Act exemptions from its coverage confirms that Congress intended those exemptions to be treated under Exemption 3 like any other withholding statute.

Hence, the "plain language of the statute[s] * * * is sufficient to resolve the question presented." *United States* v. *Weber Aircraft Corp.*, slip op. 6. As we now show, the legislative history fully supports this reading of the plain language.

B. The Legislative History Makes Clear That Privacy Act Exemption (j)(2) Is Covered By FOIA Exemption 3

1. Congress amended Exemption 3 in 1976, in response to this Court's decision in *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975), which held that Exemption 3 was intended to preserve all preexisting withholding statutes, even those that vested essentially unlimited discretion in an agency to withhold a wide range of documents. Congress sought to eliminate from the coverage of Exemption 3 those statutes granting an agency head "*cart blanche* [*sic*] to withhold any information he pleases." H.R. Rep. 94-880, 94th Cong., 2d Sess., Pt. I, at 23 (1976). See *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. at 121-122 n.18. "Congress did not, however, itself undertake to sort out those nondisclosure statutes that it comprehended as remaining within the exemption from those that it intended to exclude." *American Jewish Congress* v. *Kreps*, 574 F.2d 624, 628 (D.C. Cir.

1978). Instead, Congress incorporated general standards in Exemption 3 and left to the courts the task of determining whether any given nondisclosure statute fits within that exemption.

The thrust of Exemption 3 "is to assure that basic policy decisions on governmental secrecy be made by the Legislative rather than the Executive branch." *American Jewish Congress* v. *Kreps*, 574 F.2d at 628 (footnote omitted). Thus, in considering whether a nondisclosure statute qualifies under Exemption 3, a court's inquiry must be directed to whether the statute "is the product of congressional appreciation of the dangers inherent in airing particular data" (*ibid.*). See, *e.g.*, *Church of Scientology* v. *United States Postal Service*, 633 F.2d 1327, 1331 (9th Cir. 1980); *Founding Church of Scientology, Inc.* v. *NSA*, 610 F.2d at 827-828.

2. The legislative history of the Privacy Act [11] reveals a clear intent by Congress to empower certain agency heads to withhold intelligence and criminal investigatory records because of the grave harm that could result from their disclosure. This legislative history shows that Congress had no intention to require even segments of the type of criminal investigation and law enforcement files at issue here to be made available to an individual like respondent who is the subject of those sensitive records.

In its report on the House version of the proposed privacy legislation, the House Government Operations Committee commented on the bill's expansive exemption for criminal justice records. Recognizing the importance of exempting CIA and criminal justice records from disclosure, the Committee expressed the belief that such a broad exemption "is permissible for these two types of records because they contain particularly sensitive information." H.R. Rep. 93-1416, 93d Cong., 2d Sess. 18 (1974); *Leg. Hist.* 311. The Senate Government Operations Committee similarly expressed its concern that criminal justice files be protected from disclosure. The Committee observed that law enforcement agencies maintain files containing "highly sensitive and usually confidential information collected by law enforcement officers in anticipation of criminal activity, such as by organized crime figures, or in the course of investigating criminal activity which has already occurred." S. Rep. 93-1183, 93d Cong., 2d Sess. 23 (1974); *Leg. Hist.* 176. The Committee concluded that "it would not be appropriate to allow individuals to see their own intelligence or investigative files" (*ibid.*).[12]

The debates also convey Congress's understanding of the breadth of, and the need for, the Privacy Act exemptions. Thus, when the privacy legislation was presented on the floor of the House, one of its sponsors, Representative Moorhead, explained that "[e]ach individual shall be given access to his record within the system on his request, *with the exception of files*

[11] The history of the Privacy Act has been compiled in a single volume, Staffs of the Senate and House Comms. on Government Operations, 94th Cong., 2d Sess., *Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579)* (Comm. Print 1976) [hereinafter cited as *Leg. Hist.*].

[12] As we explain below (see page 29, *infra*), the original Senate privacy bill was amended on the Senate floor to authorize nondisclosure of this law enforcement material to the same extent as is now permissible under Exemption 7 of the FOIA. However, the Senate version did not survive for first party requests, because Congress ultimately adopted the House plan of broader protection for law enforcement files. Thus, the Senate Report accurately reflects Congress's ultimate recognition of the danger of releasing criminal justice records and its intention to authorize agencies to withhold these files.

related to criminal investigations or national security." 120 Cong. Rec. 36644 (1974) (emphasis added); *Leg. Hist.* 883.[13] In discussing the exemption in the Senate bill for law enforcement intelligence and investigative files, Senator Percy remarked that "[t]hese files, of course, are of a sensitive nature, and [the bill] provides that agencies maintaining such files may exempt them from the provisions of the bill providing that people may have access to their own records." 120 Cong. Rec. 36907 (1974); *Leg. Hist.* 811.[14]

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[13] Statements by opponents of the Privacy Act exemptions in the House demonstrate an awareness of the scope of these new exemptions. Representative Koch, who believed that the criminal justice agencies should be dealt with in separate legislation, expressed the view that, until such legislation was enacted, it was "unjustifiable to exempt criminal justice systems." See 120 Cong. Rec. 40885 (1974); *Leg. Hist.* 999. In addition, Representative Abzug, who proposed an amendment to eliminate the privacy bill's exemption for CIA files, commented on the "grave danger inherent in granting any such broad exemption. No agency should be given a general license to exempt any and all of its records and records systems." 120 Cong. Rec. 36960 (1974); *Leg. Hist.* 938. The amendment was opposed and rejected. See 120 Cong. Rec. 36962 (1974); *Leg. Hist.* 943.

[14] In his remarks concerning the exemptions, Senator Ervin, one of the principal sponsors of the privacy legislation, stated (120 Cong. Rec. 36911 (1974); *Leg. Hist.* 822):

> [T]he bill does allow the head of an agency engaged in investigatory work for criminal law enforcement purposes to exempt the agency if he finds the provisions regulating the dissemination of these records, and so on, of individuals would impede the accomplishment of his department's professional duties or statutory duties.
>
> I think those are narrow restrictions. I think they are essential if we are going to get a bill that will command the majority of both Houses of Congress, and one that will be signed into law by the President.

Thus, in considering the privacy legislation, Congress clearly expressed its concern that individuals "not be allowed to require agencies to disclose criminal justice records relating to them." *Shapiro* v. *DEA*, 721 F.2d at 221. There is no indication in the legislative history that Congress intended sensitive law enforcement materials to be exempt from access under the Privacy Act, but nonetheless available through the FOIA. Indeed, the opposite intention is manifest in the legislative record, which shows that Congress deliberately fashioned the Privacy Act access exemptions so that they would be broader in scope than the comparable FOIA exemptions.

In discussing proposed Exemptions (j) and (k), the House Report stressed that these provisions were "not intended to require * * * criminal justice agencies to withhold all their personal records from the individuals to whom they pertain." H.R. Rep. 93-1416, *supra*, at 19; *Leg. Hist.* 312. The Committee urged such agencies "to keep open whatever files are presently open" and to make files available in the future if this could be done without "infringing on the ability of the agencies to fulfill their missions" (*ibid.*). This statement reflects the belief that, by enacting the Privacy Act, Congress would be providing agencies with the means to close files that otherwise would be open to possible disclosure, presumably under the FOIA. Although the Committee urged criminal justice agencies to continue to keep these files open *if possible*, it plainly intended to allow agencies such as the FBI and the Criminal Division of the Department of Justice to close records systems in instances, such as this one, in which the agencies believe it necessary to do so in order "to fulfill their missions."

The debates concerning the Privacy Act exemptions provide further evidence of congressional intent to authorize agencies to prevent first party access to law enforcement records beyond the restrictions on disclosure of such records contained in the FOIA. For example, Representative Ichord proposed an amendment to an early version of Privacy Act Exemption (k)(2), which, as it was then drafted, was identical in scope to FOIA Exemption 7. See H.R. Rep. 93-1416, *supra*, at 19, 33; *Leg. Hist.* 312, 326. Representative Ichord's amendment was designed to enlarge the scope of this Privacy Act exemption beyond that of FOIA Exemption 7, for "the purpose of protecting the investigatory material from being raided by the thousands and perhaps tens of thousands of persons who may seek to do so for no legitimate or excusable purpose." 120 Cong. Rec. 36651 (1974); *Leg. Hist.* 902. The House adopted this amendment (120 Cong. Rec. 36963 (1974); *Leg. Hist.* 945), and it became part of the Privacy Act. See 5 U.S.C. 552a(k)(2).[10]

With regard to an amendment proposed by Representative Erlenborn to include additional exemptions from disclosure in the Privacy Act, Representative Holifield commented: "We are skating on thin ice, between freedom of information and privacy of information, and I think the extra care that this would give or the extra protection it would give to sources that might be vital to the Government in many fields is worthy of consideration." 120 Cong. Rec. 36656 (1974); *Leg. Hist.* 912. (The amendment was approved. See 120 Cong. Rec. 36658 (1974); *Leg. Hist.* 919.) This observation reveals that, in enacting the Privacy Act, Congress was conscious of the tension between privacy and access to government information, and chose to provide "extra protection" for confidential sources. This extra protection would be lost if a requester could attempt to circumvent it by utilizing the FOIA.

Finally, it is particularly significant that Congress rejected a provision in the Senate bill that would have made the Privacy Act's exemption for law enforcement records coextensive with that in the FOIA. The Senate privacy bill initially contained a broad exemption for law enforcement investigative and intelligence files. See Section 202(b) of S. 3418, 93d Cong., 2d Sess. 45 (Sept. 26, 1974); *Leg. Hist.* 141. On the Senate floor, the original language was replaced with a narrower provision substantially similar to the current FOIA Exemption 7. See S. 3418, 93d Cong., 2d Sess. 29-30 (Nov. 21, 1974); *Leg. Hist.* 362-363. The full Congress rejected this limited language, however, and instead enacted the broad law enforcement records exemptions contained in Sections (j)(2) and (k)(2) of the Privacy Act. This action demonstrates that Congress specifically intended the Privacy Act to contain broader protection for sensitive law enforcement records than does the FOIA.

In sum, the legislative history of the Privacy Act establishes that Congress was well aware of the dangers to law enforcement posed by disclosure of investigative records. Congress made clear its intention to authorize the heads of criminal justice agencies, when necessary, to withhold law enforcement records to the fullest extent of the Privacy Act exemptions. There-

[10] As enacted, Exemption (k)(2), 5 U.S.C. 552a(k)(2), covers certain investigatory material compiled for law enforcement purposes that is not included within Exemption (j)(2).

fore, the basic policy decision against disclosure was made by Congress, as required by Exemption 3.[16]

C. The Privacy Act Exemptions Would Be Deprived Of One Of Their Primary Purposes If They Are Not Withholding Statutes Within FOIA Exemption 3

1. It is plain that Privacy Act Exemptions (j) and (k) are different from, and in some respects broader than, any of the FOIA exemptions. For example, Exemption (j)(2) permits the head of an agency to exempt from first party access a wide range of specified criminal justice records. The FOIA has no exemption fully equivalent to this provision. Furthermore, as described above, unlike the FOIA exemptions, Exemption (j)(2) permits an agency to exempt from disclosure entire systems of records, not merely *segregable* portions of requested material.

The court of appeals concluded (Pet. App. 21a) that, despite the substantial differences in scope between the disclosure exemptions in the Privacy Act and those in the FOIA, Congress meant the Privacy Act exemptions to govern disclosure pursuant to the Privacy Act only. Put simply, "[i]n terms of the statutory objectives, this distinction makes little sense." *FBI* v. *Abramson*, 456 U.S. 615, 628 (1982) (footnote omitted). It means that Congress devoted considerable attention to providing Privacy Act access exemptions that are broader than the FOIA ex-

[16] Moreover, this case raises none of the concerns that led Congress to overrule the decision in *Robertson*. Exemption (j)(2) does not grant agency heads carte blanche to withhold any records they please from among a broad range of materials that may be filed with or generated within their agencies. Instead, this statute specifically identifies the types of sensitive law enforcement records about which Congress was concerned and authorizes certain criminal justice heads to prevent access to those materials only.

emptions, but nonetheless intended that persons could render those Privacy Act exemptions meaningless simply by resorting to the FOIA. Thus, under the court of appeals' approach, one would be forced to conclude that Congress meant to create Privacy Act access exemptions knowing full well that a requester could evade them by filing a request under the FOIA for the same material, even though its release was barred under the Privacy Act.

As the Seventh Circuit concluded in *Shapiro* v. *DEA*, 721 F.2d at 222, this is an entirely illogical result: "[T]he legislative history of the Privacy Act shows Congress' concern that individuals not use the Act to obtain access to their own criminal investigative files. It makes little sense to conclude that Congress would enact specific nondisclosure provisions in the Privacy Act to address this concern, while at the same time allowing individuals to bypass these exemptions by using the broader access terms of the FOIA." To accept the court of appeals' holding " 'would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.' " *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 631 (1973), quoting *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947).[17]

2. The contrary holdings of the courts of appeals here and in *Greentree* v. *United States Customs Service*, 674 F.2d 74 (D.C. Cir. 1982), would defeat the

[17] Similarly, in *Duffin* v. *Carlson*, 636 F.2d 709, 711 (1980), a panel of the D.C. Circuit stated in dictum: "From the Privacy Act's prohibition it can be strongly argued that Congress foreclosed disclosure of the same confidential information under the Freedom of Information Act. Why would Congress in one Act categorically prohibit disclosure of information furnished by informants and in another Act compel disclosure of the same confidential information?"

purpose of the Privacy Act access exemptions. In support of its holding, the D.C. Circuit in *Greentree* reasoned that, even if the Privacy Act exemptions can be evaded through the FOIA with respect to first party access, these exemptions retain some meaning because they allow an agency to exempt itself from certain other requirements of the Privacy Act. 674 F.2d at 80-81.

It is true that the Privacy Act imposes duties on agencies beyond allowing access to records (*see, e.g.*, 5 U.S.C. 552a(e)(1) to (5), (8)), and that Exemption (j) permits agencies to exempt themselves from certain of these requirements. The precise language of Exemption (j) demonstrates, however, that Congress affirmatively intended this exemption to permit agencies to withhold records from first party requesters, not merely to free agencies from other miscellaneous burdens created by the Act. Exemption (j) has a highly selective application: it applies to certain sections, subsections, and even paragraphs of the Privacy Act, but not to others. For example, Exemption (j) allows an agency to exempt records from the operation of paragraph (e)(4)(G) of the Act, but not from adjacent paragraph (e)(4)(F).

With this highly specific structure in mind, it is significant that Congress made Exemption (j) applicable to Privacy Act Section (d) in its entirety. Only subsection (d)(1) concerns access to records; subsections (d)(2) through (4) concern procedures for record correction. If, as the court in *Greentree* concluded, Congress meant in Exemption (j) to relieve agencies from the burden of record correction but not from the requirement of first party access, Congress would have followed the paragraph-by-paragraph approach it took in tailoring the reach of Exemption (j) in other respects. Congress did not do so, however, and its inclusion of first party access

among the requirements that can be avoided through agency promulgation of Exemption (j) regulations must be considered intentional, and must be given effect.

3. Although the decision below "would deprive the Privacy Act access exemptions of any effect beyond the scope of the FOIA exemptions, the government's construction allows both acts to retain their full meaning." *Shapiro* v. *DEA*, 721 F.2d at 222.

The FOIA and its exemptions cover large groups of materials wholly outside the scope of the Privacy Act. The Privacy Act access provision (Section (d)) and its exemptions (Sections (j) and (k)) apply only to first party access requests, and only where such requests concern materials that constitute Privacy Act "records." Furthermore, Privacy Act Exemption (j) is permissive rather than mandatory, and governs only when invoked through regulations promulgated by the head of a government agency. Consequently, even if Privacy Act Exemption (j)(2) is a FOIA Exemption 3 withholding statute, the FOIA exemptions would continue to govern exclusively with respect to (1) all third party requests; (2) all requests for documents that are not Privacy Act "records"; and (3) all first party requests made under the FOIA for "records," where the agency has not promulgated regulations exempting its records from the access provisions of the Privacy Act.

The court of appeals expressed the view that its interpretation of the FOIA and the Privacy Act made the two acts "perfectly reconcilable" (Pet. App. 22a). As noted above, however, to the extent that the Privacy Act access exemptions are broader than those in the FOIA, the court's holding leaves the Privacy Act e[illegible]ptions devoid of any purpose. Thus, it is only

by effectively repealing a substantial element of the Privacy Act that the court managed to render the two acts "perfectly reconcilable."

D. The Decision Of The Court Of Appeals Is Based On An Erroneous Reading Of Subsection (b)(2) Of The Privacy Act

Notwithstanding the persuasive evidence that Privacy Act Exemption (j)(2) is a withholding statute within the meaning of FOIA Exemption 3, the court of appeals held that Exemption 3 is essentially irrelevant (Pet. App. 21a n.11). Based on a misreading of the language and history of subsection (b)(2) of the Privacy Act, the court concluded that Congress intended the Privacy Act exemptions to have no effect outside that Act. The court also believed that this conclusion was compelled because it could find nothing in the Privacy Act or its history that supports an express or implied "repeal" of the FOIA (Pet. App. 21a-24a). The court therefore ruled that records that are exempt from first party access under the Privacy Act are not similarly exempt under the FOIA.

1. Contrary to the court of appeals' approach, it is not necessary to find that the Privacy Act repealed the FOIA in order to conclude that records exempt from access under the Privacy Act are also exempt under the FOIA. Exemption 3 of the FOIA specifically incorporates into the FOIA other statutes that provide for nondisclosure. See H.R. Conf. Rep. 94-1441, 94th Cong., 2d Sess. 14 (1976) The "repeal" analysis used by the court of appeals would require that, whenever an agency asserts that a particular nondisclosure statute fits within Exemption 3, it must point to statutory language or legislative history

showing that Congress intended the statute to repeal the FOIA. Yet, in the numerous cases examining the application of Exemption 3, we are not aware of a single instance in which another court has imposed such a requirement. Thus, the court erred in searching for evidence of intent to repeal the FOIA, rather than giving effect to the language and purpose of the statutes at issue.

2. Furthermore, neither the language nor the legislative history of Privacy Act subsection (b)(2), on which the court of appeals relied, supports its conclusion that the Privacy Act exemptions bar access to agency records only when a request is made pursuant to the Privacy Act and have no effect when disclosure is sought under the FOIA.

a. Section (b) of the Privacy Act generally prohibits release to requesters of agency records regarding individuals, but the section contains certain exceptions to this general rule. Subsection (b)(2) provides an exception to the general nondisclosure rule where release of a record is required by the FOIA. Relying on the decision of the D.C. Circuit in *Greentree* v. *United States Customs Service*, 674 F.2d at 78-79, the court of appeals concluded that subsection (b)(2) demonstrates that the Privacy Act's access exemptions apply only within the context of Privacy Act requests, and not where access to records is sought under the FOIA.

The plain language of Section (b) reveals, however, that this section applies exclusively to requests by *third parties* for records concerning other persons. The section's introductory language establishes that the section does *not* apply when "the individual to

whom the record pertains" makes the request for the record or consents to its release. 5 U.S.C. 552a(b).[28] In any case involving a first party request (*i.e.*, whenever a person seeks his own record), the subject of the record has actually made the request (and, by filing the request, has also consented to release). Thus, the language of Section (b) makes no sense when applied to first party requests such as that filed by respondent. It is clear, therefore, that the entire section, including subsection (b)(2), has no relevance to first party requests, and that such requests are governed instead by Section (d) of the Privacy Act, which provides the sole mechanism for first party access. *See Shapiro* v. *DEA*, 721 F.2d at 220. As we have already seen, access under Section (d) is explicitly limited by Exemption (j).[29]

[28] The opening portion of Section (b) states in pertinent part: "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, *except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains*, unless disclosure of the record would be [permissible under one of the 12 exceptions]." 5 U.S.C. 552a(b) (emphasis added).

[29] The D.C. Circuit in *Greentree* questioned why subsection (b)(2) was included in the Privacy Act if the exemptions in that Act are FOIA Exemption 3 statutes. *See* 674 F.2d at 79. The answer is that, without subsection (b)(2), Section (b) of the Privacy Act would constitute a FOIA Exemption 3 statute with respect to third party requests. Congress apparently believed that subsection (b)(2) was necessary to preserve existing third party access rights. *See* pages 37-43, *infra*. Thus, contrary to the implication in *Greentree*, a holding that Exemption (j)(2) is a FOIA Exemption 3 statute with respect to first party requests would not diminish the role of subsection (b)(2) in fulfilling its own separate purpose concerning third party requests.

b. This reading of the plain language of subsection (b)(2) is confirmed by its legislative history. The court of appeals in this case and the D.C. Circuit in *Greentree*, however, misread that history in concluding that the Privacy Act reflects a congressional intent to keep the provisions of the Privacy Act and the FOIA entirely separate.

The initial Senate privacy bill reported from committee contained two provisions that would have permitted disclosure of records in response to FOIA requests. See Sections 202(c) and 205(b) of S. 3418, 93d Cong., 2d Sess. 43, 47 (Sept. 26, 1974); *Leg. Hist.* 139, 143. Section 202(c) of the Senate bill, a forerunner of Privacy Act subsection (b)(2), provided, inter alia, that another section of the bill (Section 202(a)) barring disclosure of personal information unless the subject of the information had given his consent, would not apply "when disclosure would be required or permitted pursuant to [the FOIA]." S. 3418, *supra*, at 43 (Sept. 26, 1974); *Leg. Hist.* 139. This provision was included in the Senate bill in order "to meet the objections of press and media representatives that the statutory right of access to public records and the right to disclosure of government information might be defeated if such restrictions were to be placed on the public and press." S. Rep. 93-1183, *supra*, at 71; *Leg. Hist.* 224. Thus, the purpose of Section 202(c) apparently was to protect existing third party rights of access to government information.

Section 205(b) of the Senate bill, on the other hand, would have made the entire bill—including its provisions exempting certain records from first party access—subject to other federal disclosure statutes

and regulations.[36] "This section was intended as specific recognition of the need to permit disclosure under the [FOIA]." 120 Cong. Rec. 40406, 40882 (1974); *Leg. Hist.* 861, 989.[37] On the Senate floor, Section 202(c) was eliminated in a "perfecting amendment" (120 Cong. Rec. 36889 (1974); *Leg. Hist.* 765), and the Senate bill went forward with only Section 205(b). As a result, the bill that passed the Senate would not have increased a law enforcement agency's ability to protect its records—with respect to both first and third party requests—beyond the protections provided in the FOIA.

In contrast to the Senate bill, the House privacy bill, as reported from committee, contained no provision permitting public disclosure of personal records. See H.R. 16373, 93d Cong., 2d Sess. § (b)(2), at 22-23 (Oct. 2, 1974); *Leg. Hist.* 279-280.[38] Indeed, the

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[36] Section 205(b) stated (S. 3418, *supra*, at 47 (Sept. 26, 1974); *Leg. Hist.* 143 (emphasis omitted)):

> Nothing in this Act shall be construed to permit the withholding of any personal information which is otherwise required to be disclosed by law or any regulation thereunder.

[37] It is important to note, however, that when the Senate privacy bill containing Sections 202(c) and 205(b) was reported out of committee in September 1974, FOIA Exemption 7, relating to law enforcement files, had not yet been amended. (The amendment to Exemption 7 was not enacted until November 1974, when Congress overrode a presidential veto.) Thus, although the original Senate version of the privacy legislation would have required disclosure of law enforcement files under the FOIA, at that time FOIA Exemption 7 was interpreted as being quite broad in scope and, accordingly, few such files were subject to release. See page 43, *infra*.

[38] The original House bill contained a provision similar to subsection (b)(2) as ultimately enacted. See subsection (b)(2) of H.R. 16373, 93d Cong., 2d Sess. 4-5 (Aug. 12, 1974); *Leg. Hist.* 242-243. This provision was deleted by the House Committee.

House Committee observed that the House bill would provide even greater protection to personal privacy than Exemption 6 of the FOIA because it "would make all individually-identifiable information in Government files exempt from public disclosure." H.R. Rep. 93-1416, *supra*, at 13; *Leg. Hist.* 306. The House bill provided for first party access to agency records; that access, however, was subject to broad exemptions, similar to those in the Privacy Act as ultimately enacted. See H.R. 16373, *supra*, §§ (d), (j) and (k) at 25-26, 32-34 (Oct. 2, 1974); *Leg. Hist.* 282-283, 289-291. Accordingly, the House bill's first party access exemptions were considerably broader than those in the Senate bill. See page 29, *supra*.

In conference, the sponsors of the two bills rejected the expansive pro-disclosure language in Section 205 (b) of the Senate bill. See *Exner* v. *FBI*, 612 F.2d 1202, 1206 n.9 (9th Cir. 1980). The conferees adopted the House bill's prohibition against public disclosure, but added what is now Privacy Act subsection (b)(2), providing an exception to Section (b) for cases in which *third party* disclosure is required by the FOIA. See 120 Cong. Rec. 40406, 40882 (1974); *Leg. Hist.* 861, 989. The conferees retained the broad access exemptions in the House bill, under which an agency head may, by regulation, withhold law enforcement records from *first party* requesters. Thus, the House compromised by permitting disclosure to third parties of records that otherwise would be available under the FOIA, while the Senate compromised by accepting the broad first party ac-

cess exemptions in the House bill. By this compromise, Congress ensured that an individual would not be able to use the FOIA to obtain agency records pertaining to him where those records are exempted from first party access under the Privacy Act.[29]

In reaching the conclusion that the pro-disclosure position embodied in Section 205(b) of the Senate bill prevailed in conference, both the court of appeals (Pet. App. 23a-24a) and the D.C. Circuit in *Greentree* (674 F.2d at 83) relied on a staff-prepared analysis of the Senate-House compromise. The analysis explained (120 Cong. Rec. 40406, 40882 (1974); *Leg. Hist.* 861, 989 (emphasis added)) that the compromise

> would add an additional condition of disclosure to the House bill which prohibits disclosure *without written request of an individual* unless disclosure of the record would be pursuant to Section 552 of the Freedom of Information Act. This compromise is designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information under that section.

This analysis, which describes what became subsection (b)(2) of the Privacy Act, addresses a situation in which the consent of the subject of a record has *not* been obtained. Like the language of Section (b) itself, this passage from the staff analysis refers to disclosures pursuant to *third party* requests for information, and thus the analysis demonstrates only that it was the status quo of disclosures to third parties that the Privacy Act was intended to preserve. The compromise explanation, therefore, sheds no light on congressional intent with regard to *first party* requests, such as that made by respondent.

E. The "Third Party Anomaly" Theory Provides No Clue As To Congressional Intent And Fails To Refute The Conclusion That The Privacy Act Is An Exemption 3 Statute

In concluding that the Privacy Act access exemptions can be evaded by the mere filing of a FOIA request, the D.C. Circuit in *Greentree* relied in large measure on a theory labeled the "third party anomaly" (674 F.2d at 79-80). This theory begins with the premise that access under the FOIA is broader than under the Privacy Act. An individual making a *first party* request for a document will be denied access if agency regulations promulgated pursuant to the Privacy Act exemptions provide for withholding and those exemptions trigger FOIA Exemption 3. However, a *third party* request under the FOIA for the same document could conceivably be granted, at least in part, because Privacy Act Exemptions (j) and (k) have no effect on subsection (b)(2) of the Act, and thus are irrelevant to third party requests.

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[29] This reading of the legislative history is buttressed by Congress's enactment of Section (q) of the Privacy Act, 5 U.S.C. 552a(q). As the Seventh Circuit pointed out in *Shapiro* v. *DEA*, 721 F.2d at 221 (emphasis in original; footnotes omitted):

> Where Congress intended to retain provisions in the Senate bill that outlined other aspects of the relationship between the Privacy Act and the FOIA, it did so without qualification. For example, the original Senate version contained a provision that stated that an agency could not use FOIA exemptions to deny disclosure under a Privacy Act request, *see* S. 3418, 93d Cong., 2d Sess. § 205(a), *reprinted in* [*Leg. Hist.*] 143. The final Act retained this provision in Section (q) without any limiting provison.

See also *Painter* v. *FBI*, 615 F.2d at 690-691.

Although a "third party anomaly" might indeed exist, it is clear that the anomaly can arise only in rare instances. In the vast majority of cases, a third party would be prevented from obtaining access to records about another individual covered by the Privacy Act (particularly if they are law enforcement records) because of the FOIA's own privacy exemptions, Exemptions 6 and 7(C), 5 U.S.C. 552(b)(6) and (7)(C).[*] Under the balancing test used to apply these exemptions, such an invasion of privacy is permitted only in those instances in which the interest in preserving privacy is outweighed by a countervailing public interest in disclosure. See *United States Department of State* v. *Washington Post Co.*, 456 U.S. 595, 599-602 (1982); *Department of Air Force* v. *Rose*, 425 U.S. 352, 370-376 (1976).

The reliance placed on the third party anomaly theory by the court in *Greentree* is unjustified because the crucial question is not whether such an anomaly might exist today, but whether it sheds any light regarding the intent of Congress in enacting the Privacy Act. See *Shapiro* v. *DEA*, 721 F.2d at 223. We have found no evidence that Congress was aware that such an anomaly could arise. Therefore, the third party anomaly theory shows nothing about congressional intent, which is the crux of the inquiry here.

When it enacted the Privacy Act, Congress certainly recognized that third parties might invoke the FOIA to seek records concerning individuals. See S. Rep. 93-1183, *supra*, at 71; *Leg. Hist.* 224. Indeed, the conferees inserted subsection (b)(2) into the Privacy Act specifically "to preserve the status

[*] Moreover, the third party anomaly assumes that all other FOIA exemptions would be inapplicable.

quo as interpreted by the courts regarding the disclosure of personal information under [the FOIA]" (120 Cong. Rec. 40406, 40882 (1974); *Leg. Hist.* 861, 989). However, "[u]nder the 'status quo as interpreted by the courts' at that time, third party requesters enjoyed few rights of access to records concerning other persons" (*Shapiro* v. *DEA*, 721 F.2d at 223).

The case law in 1974 interpreted FOIA Exemption 6 quite broadly. See, *e.g.*, *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133 (3d Cir. 1974). As a general matter, the courts enforced FOIA requests for personal information only where the requests were for individuals' names and addresses. See *Getman* v. *NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *cf. Robles* v. *EPA*, 484 F.2d 843 (4th Cir. 1973) (requiring disclosure of names and addresses of persons living in houses showing unsafe levels of radiation). Courts refused to compel the disclosure of records where FOIA requests sought more detailed information about individuals. See *Rural Housing Alliance* v. *United States Department of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974). "Moreover, although Congress had amended FOIA Exemption 7 to expand access to criminal investigative records just before passing the Privacy Act, this was not the 'status quo as interpreted by the courts' at that time." *Shapiro* v. *DEA*, 721 F.2d at 223.[*] Thus, under contemporaneous decisions interpreting the relevant FOIA exemptions, a third party anomaly was unlikely to have arisen

[*] Indeed, the 1974 amendment to Exemption 7 was for the express purpose of responding to four decisions of the D.C. Circuit that had given a broad reading to Exemption 7. See *FBI* v. *Abramson*, 456 U.S. at 627 n.11; *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 227-229 (1978).

with respect to requests for law enforcement records such as those sought by respondent.

As noted above, the relevant question is what Congress intended in 1974 when it enacted the Privacy Act. During its consideration of the Act, Congress expressly referred to two examples of the type of personal information that it believed should be disclosed to third parties under the FOIA: data regarding government licensees and information concerning federal employees. See H.R. Rep. 93-1416, *supra*, at 13; *Leg. Hist.* 306. This information is not at all comparable to the sort of sensitive law enforcement material sought by respondent. Accordingly, the fact that a third party anomaly may now exist under the FOIA as currently formulated and interpreted by *some* lower courts is irrelevant in discerning congressional intent in enacting the Privacy Act a decade ago.[28]

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[28] The court in *Greentree* observed (674 F.2d at 79) that, even if the Privacy Act exemptions are FOIA Exemption 3 withholding statutes, those exemptions could be avoided by a calculating requester who uses an agent to take advantage of the third party anomaly. Under such a scheme, a requester who could not obtain his own file could ask a friend or cellmate to request the file under the FOIA, and the subject would then send a letter to the agency waiving any privacy interest.

There is no mention of this sham request ploy in the legislative history of the Privacy Act and it therefore sheds no light on the issue under consideration. This hypothetical scheme raises a wholly separate question as to whether an agency must honor such a request. Cf. *Doyle* v. *United States Department of Justice*, 668 F.2d 1365 (D.C. Cir. 1981), cert. denied, 455 U.S. 1002 (1982) (court upheld denial of FOIA request because requester was a fugitive from justice). That question should be reserved for a different lawsuit because its resolution would reveal nothing about whether Congress intended the Privacy Act to be an Exemption 3 statute.

F. The Court Of Appeals Relied On An Administrative Interpretation Of The Privacy Act That Has Since Been Repudiated

The court of appeals placed great reliance (Pet. App. 24a-26a) on an interpretation of the Privacy Act prepared in 1975 (40 Fed. Reg. 56742-56743) by the Office of Management and Budget, the agency charged with responsibility for developing guidelines for implementation of the Privacy Act. See Pub. L. No. 93-579, § 6, 88 Stat. 1909. The question presented here, however, involves the interaction of the Privacy Act and the FOIA. The Department of Justice has been designated as the lead agency for the FOIA. See 5 U.S.C. 552(d). Thus, the views of the Department of Justice are also pertinent.

Several months after the Privacy Act was enacted, the Department of Justice issued a letter that analyzed the interaction between the Privacy Act and the FOIA and concluded that "the Privacy Act is the exclusive remedy for an individual who seeks records about himself contained in a system of records covered by the Privacy Act" (121 Cong. Rec. 32890 (1975) (letter from Deputy Assistant Attorney General Lawton); *Leg. Hist.* 1177). In reaching that conclusion, the Department observed that a contrary interpretation would nullify the Privacy Act access exemptions to the extent that they extend beyond the protections in the FOIA (*ibid.*). Therefore, under the Department of Justice's contemporaneous construction of the statutes, the Privacy Act's exemptions could not be circumvented through use of the FOIA.

In August 1975, shortly after issuance of the letter, Senator Kennedy wrote to Attorey General Levi expressing his disagreement with the Department's interpretation. 121 Cong. Rec. 32890-32891 (1975);

Leg. Hist. 1178-1180.[27] In response, Deputy Attorney General Tyler sent Senator Kennedy a draft regulation describing how the Department of Justice intended to process first party requests for records. 121 Cong. Rec. 32894 (1975); *Leg. Hist.* 1187-1188. The regulation (later codified at 28 C.F.R. 16.57), provided that, as a matter of agency discretion, a first party requester seeking access to records exempted under the Privacy Act would be given all records within the scope of his request to which he would have been entitled under the FOIA. The regulation was prefaced by a statement that nothing in it was meant to be a waiver of the Department's position that first party requests are subject to all Privacy Act exemptions. Thus, the position of the Department of Justice shortly after enactment of the Privacy Act was that the new act's access exemptions could not be overridden by the FOIA.[28]

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[27] This letter from Senator Kennedy cannot be viewed as persuasive evidence of congressional intent because it was not written until nine months after the Privacy Act was enacted. See *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. at 118 n.13; see also *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). Moreover, the letter represents the view of a single legislator; because the ideas expressed in the letter were not stated during consideration of the privacy legislation and other members of Congress had no opportunity to voice their agreement or disagreement, it is of no value as an indicator of congressional intent.

[28] It is true that the government took the opposite position in litigation in the district court in *Greentree* and other cases. However, after the Seventh Circuit's ruling in *Terkel* v. *Kelly*, 599 F.2d 214 (1979), cert. denied, 444 U.S. 1013 (1980), the Fifth Circuit's decision in *Painter* v. *FBI*, supra, and the district court's decision in *Greentree*, Department of Justice officials reexamined the position that the government had been taking in litigation and concluded that the FOIA could not be used to evade the Privacy Act access exemptions. This conclusion also led the Department to delete the regulation (28 C.F.R. 16.57) stating that the Department would exercise its discretion to disclose to first parties information exempt under the Privacy Act but otherwise disclosable under the FOIA. See 49 Fed. Reg. 12248, 12252 (1984).

Furthermore, OMB has recently completed a thorough review of the original Privacy Act guideline relied upon by the court of appeals, and has determined that this guideline should be changed. See 49 Fed. Reg. 12338-12341 (1984). OMB based its determination on a careful analysis of the Privacy Act's language and history. After examining the reasoning of the courts of appeals here and in *Greentree*, OMB found that reasoning at odds with the manifest intent of Congress to create in the Privacy Act exemptions from disclosure broader than those in the FOIA. 49 Fed. Reg. 12339-12341 (1984). In its capacity as the lead agency for the Privacy Act, OMB concluded that the Privacy Act exemptions are withholding statutes within the meaning of FOIA Exemption 3 and that, therefore, agency records exempt from disclosure under the Privacy Act are, to that extent, also exempt from disclosure under the FOIA.[29]

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[29] The fact that OMB did not issue its new guideline until after the issue had been litigated in this and other cases is of no consequence. Congress authorized OMB to issue guidelines and regulations for use by agencies in implementing the Privacy Act. Pub. L. No. 93-579, § 6, 88 Stat. 1909. Even if the new guideline was a response to this and other lawsuits, that demonstrates only that these suits brought to OMB's attention the fact that its earlier guideline did not thoroughly consider the complex question of statutory construction presented here. Thus, when OMB revised its guideline to reflect congressional intent, "it was doing no more than the task which Congress had assigned it." *United States* v. *Morton*, No. 83-916 (June 19, 1984), slip op. 13 n.21.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. The Freedom of Information Act (5 U.S.C. 552) provides:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing

identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the part has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule

of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complaint resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the

case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which

a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for rec-

ords, the records shall be made promptly available to such persons making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appopriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsection (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

The Privacy Act (5 U.S.C. 552a) provides:

§ 552a. Records maintained on individuals

(a) Definitions

For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) Conditions of disclosure

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by,

or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized

by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) pursuant to the order of a court of competent jurisdiction.

(c) Accounting of certain disclosures

Each agency, with respect to each system of records under its control shall—

(1) except for disclosures made under subsection (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records

Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written 'statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such a review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after

his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements

Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by

statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the

system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an indvidual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy,

relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of

records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

(f) Agency rules

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of

his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) Civil remedies

Whenever an agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly

withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in contro-

versy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians

For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) Criminal penalties

Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General exemptions

The head of an agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and no-

tations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section; *Provided, however,* That if any individual is denied any right, privilege,

or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express purpose that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(l)(1) Archival records

Each agency record which is accepted by the Administrator of General Services for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Administrator of General Services shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government contractors

When an agency provides by a contract for the operation by or on behalf of the agency a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of sub-

section (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(n) Mailing lists

An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Report on new systems

Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

(p) Annual report

The President shall submit to the Speaker of the House and the President of the Senate, by June 30 of each calendar year, a consolidated report, separately listing for each Federal agency the number of records contained in any system of records which were exempted from the application of this section under the provi-

sions of subsections (j) and (k) of this section during the preceding calendar year, and the reasons for the exemptions, and such other information as indicates efforts to administer fully this section.

(q) Effect of other laws

No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

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RESPONDENT'S

BRIEF

No. 83-1045

In The

Supreme Court of the United States

October Term, 1983

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION,

Petitioners,

vs.

ANTHONY PROVENZANO,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether Section (j)(2) of the Privacy Act, 5 U.S.C. §552a(j)(2), takes away an individual's right of access to Government records concerning himself, where such access has been granted by The Freedom of Information Act, 5 U.S.C. §552?

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BRIEF FOR RESPONDENT

SUMMARY OF ARGUMENT

The issue raised by this case is whether the Privacy Act, 5 U.S.C. §552a, stripped from an individual the right given to him under the Freedom of Information Act, 5 U.S.C. §552, to obtain

Government records concerning himself, always subject, of course, to the various specific exemptions found in the FOIA. The Third Circuit correctly answered that question in the negative after carefully reviewing the language of both Acts and the pertinent legislative history. That decision was in accord with, and relied upon, an earlier comprehensive analysis by the District of Columbia Circuit. As a result, the decision below should be affirmed.

The Privacy Act in 5 U.S.C. §552a(j)(2), permits an agency to exempt from its disclosure provisions records that are contained in agency — designated "systems of records". However, that section, and another dealing with similar exemptions, both exempt the records from "this section", plainly referring only to the Privacy Act itself and not to the FOIA. Thus, it is quite clear that the Privacy Act is self-contained; its exemptions impact only upon itself and not upon any other statute.

Furthermore, the disclosure section of the Privacy Act, 5 U.S.C. §552a(b), in its subsection (2) plainly states that exemption from disclosure does not apply when disclosure is "required under section 552 [the FOIA] of this title". The Government's argument that this section only applies to third-party requests, that is requests by a person other than the subject of the records, rests upon a strained reading of the section, and results in a totally incongruous situation that could not have been intended by Congress. Under the Government's analysis, third parties could obtain an individual's records pursuant to the FOIA while the subject themselves would be blocked from access to his own records as a result of the Privacy Act. In addition, due to definitional differences between the two Acts, corporations and foreign nationals, who are not covered by the Privacy Act at all, could obtain their own records under FOIA, while, according to the Government, United States citizens could not.

The Government's argument is essentially that the Privacy Act repealed by implication rights of first party access granted by the FOIA. For there to be such an implied repeal, there would have to be an irreconcilable conflict between the two laws or an intention on the part of Congress that the later one is intended as a substitute for the earlier. Neither situation exists here. The two Acts can be reconciled, and the Privacy Act expressly makes it clear that it was not intended to replace the FOIA. Indeed, the two deal with essentially different concerns; the FOIA with access to Government records and the Privacy Act, as its name implies, with assuring the accuracy and privacy of such records.

The legislative history of the Privacy Act contains no clear cut intention to repeal, or remove, the first party access rights granted by the FOIA. Indeed, after compromising between different Senate and House versions, the final Act adopted language from the Senate bill which made quite clear that the Privacy Act was not intended to affect rights granted under the FOIA. The report accompanying the final bill made this point; that the "status quo" be preserved with respect to the disclosure permitted under the FOIA. Further support for this position is found in the 1974 Amendment to FOIA Exemption 7, *increasing* access to law enforcement records, virtually contemporaneous with enactment of the Privacy Act. It makes no sense to suggest that Congress repealed first party access rights only a few weeks after they increased such rights over a presidential veto. Finally, the Office of Management and Budget, charged with developing guidelines and regulations for the Privacy Act's implementation, as well as other groups involved in the implementation, took the position that the Privacy Act did not impact upon the FOIA first party access rights. The Executive Branch did not come out firmly for its present position until many years after enactment of the Privacy Act.

Even if it had been Congress' undisclosed intention to remove certain FOIA rights by virtue of Privacy Act exemption (j)(2),

that section would still have to meet the requirements of FOIA Exemption 3. 5 U.S.C. §552(b)(3). That section, insofar as pertinent here, exempts from disclosure matters exempted by other statutes if the other statute "refers to particular types of matters to be withheld." The broad exemption for entire "systems of records" found in Privacy Act (j)(2) simply cannot meet that standard. It is so all-encompassing as to render the term "particular" meaningless. Indeed, in this case it would apply to the entire FBI Central Records System. The sweep of (j)(2) is far beyond any statute ever found to come within Exemption 3. It is precisely the type of statute that caused Congress to amend Exemption 3 in reaction to *Administrator FAA v. Robertson*, 422 U.S. 255 (1975). Section (j)(2), with its exemption for "information compiled for the purpose of criminal investigation", hardly differs at all from the original version of FOIA Exemption 7 ("investigatory files compiled for law enforcement purposes") which was amended in 1974 as a result of congressional concern that it exempted too many Government files. Furthermore, the type of blanket exemption created by (j)(2) would frustrate FOIA policy to grant access to "reasonably segregable" portion of records otherwise exempt.

Thus, since Privacy Act (j)(2) does not meet the strict criteria required to constitute it a FOIA Exemption 3 statute, it cannot be held to affect first party access rights granted by the FOIA.

ARGUMENT

I.

THE PRIVACY ACT DOES NOT AFFECT AN INDIVIDUAL'S RIGHT OF ACCESS TO HIS OWN RECORDS UNDER THE FOIA.

The Third Circuit rejected the Government's contention that the Privacy Act constitutes the sole means by which an individual may gain access to his own records, thereby repealing whatever rights such individual, a so-called "first party requester", had been granted under the FOIA. *Porter v. Department of Justice*, 717 F.2d 787 (3rd Cir. 1983).[1] To the contrary, the Court held that an individual's right to such records under the FOIA was in no way affected by enactment of the Privacy Act. In so ruling, the Court followed the lead of the District of Columbia Circuit in *Greentree v. United States Customs Service*, 674 F.2d 74 (D.C. Cir. 1982), finding the analysis therein "entirely persuasive", 717 F.2d at 796. Respondent subscribes to the reasoning found in both *Greentree* and *Porter*.

A. The Plain Language Of The Privacy Act Demonstrates That It Does Not Affect Rights Under The FOIA.

Of course, the starting point of any statutory inquiry must be the language of the enactment. Where the terms of a statute are unambiguous, then in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily

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1. We will follow the Government's lead in referring to *Porter* as constituting the opinion below since *Provenzano* simply incorporated the *Porter* opinion, the two cases having been argued together. *Provenzano v. Department of Justice*, 717 F.2d 799 (3rd Cir. 1983), *cert. granted*, No. 83-1045 (April 2, 1984).

be regarded as conclusive." *CPSC v. GTE Sylvania*, 447 U.S. 102, 108 (1980); *United States v. Turkette*, 452 U.S. 576, 580 (1981).

1. Both subsections of the Privacy Act dealing with exemptions state quite clearly that such exemptions are only with respect to specified portions of "this section", 5 U.S.C. §§552a(j), (k). Thus, as Judge Gibbons said in *Porter*, the "plain language refers only to exemptions from the provisions of Section 552a, not to any other section in Title 5 or to any other disclosure statute." 717 F.2d at 796. And as the Court stated in *Greentree*, 674 F.2d at 79,

> This portion of the statute thus appears to be self-contained: the general exemptions, as well as the specific exceptions limit only other provisions of the Privacy Act itself.

It is clear that Congress' choice of words in this connection was not accidental. When Congress intended to refer to other parts of Title 5, such as the FOIA, it routinely used the phrase "this title". *See* 5 U.S.C. §§552a(j)(q), the latter specifically referring to FOIA. *See also, Porter*, 717 F.2d at 797.

The Government misconceives this point. It is not a question of whether a withholding statute as a general matter "must include a specific reference to the FOIA" (Brief for Petitioners 21) but, rather, whether this particular statute, at least insofar as its exemption provisions are concerned, is self-contained and, therefore, does not impact upon any other disclosure statute. Whatever the "focus" of Congress may have been, the fact remains that it used certain language in a way that simply does not admit of a contrary interpretation.

2. This point is made even clearer when one refers to the language of Section (b)(2) itself. 5 U.S.C. §552a(b)(2). That

subsection "expressly excepts disclosures required under the Freedom of Information Act". *Porter*, 717 F.2d at 797. In pertinent part, the Section reads:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be —
>
> . . .
>
> (2) Required under section 552 of this Title.

In the face of the rather plain meaning of this Section the Government contends (Brief for Petitioners 35-36) that the Section only applies to third party requests. First, we do not read the Section that way. The clause unambiguously permits the release of records to "any person", but simply conditions such release upon the receipt of a "written request" either by the individual involved with respect to his own records or, in the case of third party requests, with the individual's "prior written consent". The Government's interpretation is, we suggest, strained, if not "tortured", and the Third Circuit was being more than charitable when it described this contention as "not apparent on the face of the statute". *Porter* at 797.

Furthermore, the Government's answer to the question posed in *Greentree*, 674 F.2d at 79, as to why subsection (b)(2) was included in the Privacy Act at all if the exemptions in that Act are FOIA Exemption 3 statutes, simply leads us directly into the so-called "third party anomaly". The Government suggests that without (b)(2), Section (b) of the Privacy Act would bar access

of third parties pursuant to FOIA Exemption 3, and that Congress "apparently believed that subsection (b)(2) was necessary to preserve existing third party access rights" (Brief for Petitioners 36 n.19). The result of the Government's reasoning is that third parties can gain access to material under FOIA about an individual, which the individual himself cannot obtain due to Privacy Act Section (j)(2). In our view the *Greentree* court persuasively laid this construction to rest:

> Such a result would comport with neither logic nor common sense. If such material were allowed into the public domain, how could it be kept from the party whom it concerned? Obviously, any such barrier to first party access could easily be circumvented by the first party's simply requesting someone else to act as a third party FOIA requester.

Although the Government concedes the existence of this outlandish result, it suggests that the situation will not arise often and, furthermore, that the anomaly is of no significance because Congress was not aware of the potential problem at the time it enacted the Privacy Act (Brief for Petitioners 42). We disagree that this remarkable result only becomes relevant if there is evidence that Congress knew of it at the time. It is indeed relevant to our inquiry because a statute should not be interpreted in such a way as to "produce incongruous results". *Maistro Plastics Corp. v. NLRB*, 350 U.S. 270, 286 (1956).

While the use of sham requesters is not strictly an anomaly, it is surely a result that Congress likewise could not have intended. And it is certainly not a situation that would be likely to escape the legislative mind, whether expressed in the legislative history or not. However, here again the Government simply brushes the issue aside as a purely "hypothetical scheme" (Brief for Petitioners

44 n.26), without analysis and without any suggestion that such a "sham request ploy" is not both feasible and likely under its construction of the statute.

Nor are these the only incongruous results under the Government's construction. Given the different definitions of "person" in the FOIA, 5 U.S.C. §551(2) and "individual" in the Privacy Act, 5 U.S.C. §552a(a)(2), a corporation or a foreign national could obtain records about themselves under the FOIA, since they would not be covered by the Privacy Act at all. *See Porter*, 717 F.2d at 795. All of these irrational results point towards a single conclusion; that Congress could not have intended the Privacy Act to effectively repeal the FOIA, at least as to first party requesters.

As the *Greentree* court concluded, 674 F.2d at 79, "section (b)(2) of the Privacy Act represents a congressional mandate that the Privacy Act *not* be used as a barrier to FOIA access". (emphasis in original).

3. Taking our approach, and thereby concluding that Privacy Act (b)(2) does not effect rights of access under the FOIA, one is led inescapably to the conclusion that the Government's position amounts to an argument that Privacy Act Section (d) repeals the Freedom of Information Act by implication, at least insofar as it applies to first party access. Not surprisingly, the Government rejects this suggestion (Brief for Petitioners 34-35) undoubtedly recognizing, as did the court below, *Porter* at 797, that such repeals are not favored. *United States v. Continental Tuna Corp.*, 425 U.S. 164, 168 (1976).

We are not dealing here with just another disclosure statute, such as those cited by the Government, and discussed hereafter (Point II, *infra*) as constituting Exemption 3 statutes. The Privacy Act is a far ranging enactment, as is the FOIA, evidencing

"Congressional concern with open government, and especially, accessibility to government records". *Greentree*, 674 F.2d at 76. Each of these statutes "seeks in different ways to respond to the potential excesses of government". *Ibid.* There are, essentially, no other comparable federal laws. Therefore, if one is to be construed as taking away rights granted by the other, without expressly saying so, it is difficult to term the process anything less than a repeal by implication. Given the timing of each enactment, and the various amendments since that time, discussed *infra*, there can be little doubt that Congress was well aware of FOIA when the Privacy Act became law. It was hardly an obscure statute that might have passed unnoticed. It is altogether remarkable to argue that the subsequent statute stripped away substantial rights granted by the earlier one, and yet claim that there was no repeal by implication.

4. Such a repeal may be found, nevertheless, either "(1) where provisions in the two acts are in irreconcilable conflict" or "(2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute. . . . But, in either case, the intention of the legislature to repeal must be clear and manifest". *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976), quoting from *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). Clearly, neither of these rigorous standards is met here.

> The Privacy Act and the Freedom of Information Act are perfectly reconcilable by reading the special remedy in section 552a(d) as serving to vindicate privacy interests in a special manner, while leaving standing the pre-existing Freedom of Information Act remedy providing access to information for its own sake. Moreover, the Privacy Act expressly states that it is not intended as a substitute for the Freedom of Information Act. Indeed its basic thrust is in an opposite direction. To a large extent,

> though not entirely, it is designed to discourage rather than encourage disclosure of information impinging upon the privacy of individuals. Given the strict rule against repeals by implication, a legislative intent to accomplish such a repeal in this instance would have to appear in the legislative history with overwhelming clarity. There is no such clarity.

Porter v. Department of Justice, 717 F.2d at 797; *see also*, *Greentree*, 674 F.2d at 80-81.

5. Thus, the language of the Privacy Act certainly does not compel the conclusion that it was intended to take away major rights granted to individuals under the FOIA. Indeed, it strongly points toward just an opposite conclusion. While respondent considers the issue to be resolved without recourse to the legislative history, we would understand the vigor with which the Government advances its statutory construction arguments if perhaps there were some unambiguous statement in that history which demonstrated clearly that Congress did intend the Privacy Act to remove rights granted under the FOIA. Unfortunately, there is no such expression of legislative intent.

B. The Legislative History Fails To Provide Support For The Government's Contention That The Privacy Act Was Intended To Take Away The Right Of Access Granted To First Party Requesters Under The FOIA.

1. As we have shown above, Section (b)(2) of the Privacy Act expressly provides for continued access under the FOIA. That Section came about in its present form as a result of a compromise between conflicting Senate and House provisions.

The initial version of the Privacy Act that came out of the House Committee, stated that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of the individual to whom the records pertains. . . ." H.R. 16373, 93rd Cong. 2d Sess. §552a(b) (1974), reprinted in Legislative History of the Privacy Act of 1974, S. 3418 (Public Law 93-579), Source Book on Privacy 279 (hereafter Source Book). That provision did not exempt information required to be disclosed under the FOIA, and the House Committee recognized the effect this proposal would have on the FOIA by making "all individually identifiable information in Government files exempt from public disclosure". H.R. Rep. No. 1416, 93rd Cong. 2d Sess. 13 (1974), reprinted in Source Book at 306. In light of that potential impact, the Committee indicated that it wished some kinds of individually — identifiable records to continue to be made available to the public. The Committee, they said,

> . . . believes that the public interest requires the disclosure of some personal information. Examples of such information are certain data about government licensees, and the names, titles, salaries, and duty stations of most Federal employees. The Committee merely intends that agencies consider the disclosure of this type of information on a category-by-category basis and allow by published rule only those disclosures which would not violate the spirit of the Freedom of Information Act by constituting "clearly unwarranted invasions of personal privacy".

H.R. Rep. No. 1416, 93d Cong., 2d Sess. 13 (1974), reprinted in Source Book at 306.

The Privacy Bill that came out of the Senate Committee contained two sections which protected disclosure rights under the FOIA. First, Section 205(b), which remained in the final Senate bill, barred agencies from "withholding . . . any personal information which is required to be disclosed by law or any regulation thereunder", reprinted in Source Book at 143. Second, Section 202(c), subsequently eliminated from the final Senate version, Source Book at 765, provided that certain disclosure requirements did "not apply when disclosure would be required or permitted pursuant to . . . [the] Freedom of Information Act", Source Book at 139. The Senate Report explained as follows:

> [Section 202(c)] was included to meet the objections of press and media representatives that the statutory right of access to public records and the right to disclosure of government information might be defeated if such restrictions were to be placed on the public and press. The Committee believed it would be unreasonable and contrary to the spirit of the Freedom of Information Act to attempt to keep an accounting of the nature and purpose of access and disclosures involving the press and public or to impose guarantees of security and confidentiality on the data they acquire.
>
> While the Committee intends in this legislation to implement the guarantees of individual privacy, it also intends to make available to the press and public all possible information concerning the operations of the Federal Government in order to prevent secret data banks and unauthorized investigative programs on Americans.

S. Rep. No. 1183, 93d Cong., 2d Sess. 71 (1974), U.S. Code Cong. & Admin. News 1974, p. 6916, 6985, reprinted in Source Book

at 224. Along with Section 202(c) was a provision that prohibited agencies from relying upon FOIA to withhold information under the Privacy Act, S. 3418, 93d Cong., 2d Sess. §205(a), reprinted in Source Book at 143. That provision, which ended up as Section 205a(q) of the final Act, was explained by the Senate Report as follows:

> Subsection 205(a). Shows the Committee's intent that the exemptions provided in the Freedom of Information Act to the required disclosure of Federal Information on certain subjects, and that permitted for protection of personal privacy may not be used as authority to deny an individual personal information otherwise available under this Act.

S. Rep. No. 1183, 93d Cong., 2d Sess. 71, 77 (1974), U.S. Code Cong. & Admin. News 1974, p. 6991, reprinted in Source Book at 230.

Finally, the two versions were compromised. The House bill was adopted, but with two significant amendments. The first, which ended up as §552a(b)(2), modified the House's restriction on disclosure, and was obviously intended to incorporate the policy embodied in Section 205(b) of the original Senate bill, S. 3418, which, significantly, applied to both first-party and third-party requesters. The second compromise amendment resulted in the present §552a(q) and was the mirror image of (b)(2) in that it prohibited agencies from relying upon the FOIA to withhold any record otherwise available under the Privacy Act, whereas (b)(2) ensured that the Privacy Act would not interfere with access under FOIA.

Most importantly, the compromise was accompanied by a report which explained the result this way:

> The compromise amendment would add an additional condition of disclosure to the House bill which prohibits disclosure without written request of an individual unless disclosure of the record would be pursuant to Section 552 of the Freedom of Information Act. This compromise is designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information under that section.
>
> A related amendment taken from the Senate bill would prohibit any agency from relying upon any exemption contained in Section 552 to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

Source Book at 861 (explained to Senate by Senator Ervin), 989 (explained to House by Representative Moorhead).

Thus, Congress intended that the Privacy Act have no effect on disclosures mandated under the FOIA, and *vice versa*. As the *Greentree* Court concluded, after an extensive analysis of the legislative history, "throughout its consideration of the Privacy Act, the Senate struggled to hold separate the Privacy Act and FOIA, and further, . . . that effort was ultimately successful". 674 F.2d at 81-83. *See also, Porter*, 717 F.2d at 798.[2]

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2. The commentators who have addressed this question have uniformly concluded that Congress clearly intended that the Privacy Act have no effect on the operation of the FOIA; public access was to remain as before. Note, *The Privacy Act of 1974: An Overview*, 1976 Duke L.J. 301, 312 (1976); *see also*, Comment, *The Freedom of Information Act's Privacy Exemption and The Privacy Act of 1974*, 11 Harv. Civ. Rights — Civ. Lib. L. Rev. 596, 624 (1976); Hulett, *Privacy and The Freedom of Information Act*, 27 Admin. L. Rev. 275, 288 (1975); Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1338-39 (1975).

2. Furthermore, the 1974 Amendment to FOIA Exemption 7, *increasing* access to law enforcement records, further supports the view that the Privacy Act was not intended to tamper with first party access rights under FOIA. That amendment was passed only a matter of weeks before the Privacy Act, *see*, 1974 U.S. Code Cong. & Admin. News 6267, 6290-6292 (1974). In fact, Congress actually had the Privacy Act under consideration at the very time it was voting to override President Ford's veto of the 1974 FOIA amendments. *See, Greentree*, 674 F.2d at 83-84. As the Court noted there;

> . . . we are hard pressed to accept an interpretation of the Privacy Act that in effect repeals, for first party requesters, those amendments only a few weeks after they were enacted over a Presidential veto.

3. Finally, the contemporaneous construction of the interplay between the two statutes has been in accordance with the position espoused here. Thus, the Office of Management and Budget (O.M.B.), which was specifically "charged with the responsibility for developing guidelines and regulations for the [Privacy] Act's implementation by Government Agencies, Privacy Act of 1974, Pub. L. No. 93-579, §6, 88 Stat. 1896, 1909", *Porter*, 717 F.2d at 798, took the unambiguous position, after passage of the Privacy Act but before its effective date, that the later statute "not be used to deny access to information about an individual which would otherwise have been required to be disclosed to that individual under the Freedom of Information Act". 40 Fed. Reg. 56742-43.

The Privacy Protection Study Commission, which was established by Section 5 of the Act to study the functioning of the Act, took the same position, *Report of the Privacy Protection Study Commission, Privacy Act of 1974: An Assessment*, App.

4 at 37 (1977), as did the staff of the Senate Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, *Report on Oversight Hearings on Agency Implementation of the 1974 Amendments to the Freedom of Information Act*, 95th Cong. 2d Sess. 123 (Comm. Print 1980). *See Greentree*, 674 F.2d at 85-86 n.28, where the Court noted that "the prevailing understanding among those intimately involved in the implementation of the Privacy Act — exclusive of the Executive Branch — was that the Privacy Act and FOIA were independent bases for access by individuals to their own records". *See also, Porter*, 717 F.2d at 798-799.

4. While the Government is certainly free to change positions, one would think that if the construction of the Privacy Act, and the legislative history, were as clear as petitioners now suggest, the Government's position would have been consistent from the outset. Of course, that was not the case. Pursuant to 28 C.F.R. §16.57(b), the Government had adopted a policy of granting an individual access to his records in an exempt "system of records" to the extent that the individual would have been entitled to such records under the FOIA. The Government retained, however, the right to determine in which case it would grant this access and in which to deny it. §16.57(a). Apparently in accordance with that policy, the Government never raised its present objection when respondent first requested his records in 1978 (JA13-14). Indeed, even through the lower court proceedings in *Greentree*, the Government took exactly the opposite of its present position. 674 F.2d at 75. We suggest that the Government came late to its present position precisely because of the weaknesses pointed out herein.

II.

PRIVACY ACT EXEMPTION (j)(2) FAILS TO MEET THE REQUIREMENTS NECESSARY TO MAKE IT A FOIA EXEMPTION 3 STATUTE.

Looking to the language of Privacy Act Exemption (j)(2), it is quite clear that it could not constitute a FOIA Exemption 3 statute, even if there could be gleaned an undisclosed intention on the part of Congress to make it so. It simply fails to meet a number of the requirements set forth in Exemption 3 itself, and as that section has been properly construed by lower courts.

1. We must begin with the basic proposition that Exemption 3, as with all of the FOIA exemptions, is to be construed narrowly, in furtherance of the Act's basic purpose to effectuate full disclosure. *Department of the Air Force v. Rose*, 425 U.S. 352, 360-361, 366 (1975), quoting from *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975).

2. Section (b)(3) of the FOIA exempts from disclosure matters that are specifically exempted from disclosure by any other statute, provided that such statute,

> (A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or
>
> (B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

After extensively reviewing the legislative history of Exemption 3, the Court in *Delaurentis v. Haig*, 686 F.2d 192, 197 (3d Cir. 1982), concluded,

> The only sensible reading of Exemption 3, therefore, is that clause (A) refers to mandatory withholding statutes, and clause (B) refers to particular types of permissive withholding statutes, which, if they meet the criteria established by clause (B), qualify as exempting statutes under FOIA.

See Founding Church of Scientology, Inc. v. National Security Agency, 610 F.2d 824, 827 (D.C. Cir. 1979).

Here, it is evident that subsection (A) of Exemption 3 is not involved, since Section (j)(2) of the Privacy Act is only a permissive withholding statute ("The head of an agency *may* promulgate rules . . . to exempt any system of records within the agency from any part of this section . . ."). Thus, we deal here solely with subsection (B) of Exemption 3, which itself contains two possibilities for a permissive withholding statute to qualify: one, if it establishes "particular criteria for withholding", or, two, if it "refers to particular types of matters to be withheld".

It is clear that Privacy Act (j)(2) does not establish "particular criteria for withholding", and the Government apparently makes no contention that it does (Brief for Petitioners 18-20). Rather, they contend that (j)(2) sufficiently describes the "particular types of matters to be withheld" *Ibid.* We agree that this is the only conceivably relevant part of Exemption 3 that needs to be considered here, but, not surprisingly, we reach quite a different conclusion.

3. (j)(2) exempts from disclosure under the Privacy Act "systems of records", if the system is:

> (1) Maintained by the Central Intelligence Agency; or

> (2) Maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime, or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations, charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement through release from supervision.

Of course, we are concerned here with subsection (2) and presumably (B) or (C) of that subsection. In this case, the records in question are found in a number of "systems of records" found in both the FBI and the Criminal Division of the Department of Justice. With respect to the FBI, the "system" is designated "FBI Central Records System" (JA19-20), which apparently comprises virtually all of the records maintained by the FBI. That system was exempted from disclosure by the Government under 28 C.F.R. Section 16.96 (JA22). The Justice Department records concerning respondent are found in a number of "systems", including the "Central Criminal Division Index File and associated records", all of which were exempted under 28 C.F.R. Section 16.91 (JA16).

The description of the categories in Privacy Act (j)(2) is so broad and all encompassing, as evidenced by the manner in which it has been applied here, as to render the term "particular" meaningless if applied to these "records" within these "systems". Specifically, we are talking about "information compiled for the purpose of a criminal investigation" and "reports . . . compiled at any stage of the process of enforcement of the criminal laws". There can be little doubt that such records encompass, or could reasonably be construed to encompass, literally every piece of paper accumulated by a law enforcement agency. Indeed, as we have noted, it does include seemingly all of the records in the FBI, which presumably compiles all of its information "for the purpose of . . . criminal investigation".

The sweep of the (j)(2) language is unparalleled among federal statutes. The Government's reference to other Exemption 3 statutes does not support its position, but, rather, undermines it.

4. Respondent disputes that any of the statutes cited by the Government as having been upheld as Exemption 3 statutes, are "considerably less specific than Privacy Act Exemption (j)(2)". (Brief for Petitioners 20).

The weakness in the Government's argument is perhaps best exemplified by its reference to 26 U.S.C. §6103, found to come within Exemption 3 in *Chamberlain v. Kurtz*, 589 F.2d 827, 839 (5th Cir. 1979), *cert. denied*, 444 U.S. 842 (1979), and in *King v. I.R.S.*, 688 F.2d 488, 496 (7th Cir. 1982). The Government

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1. The statutory definition of record, in its sweeping terms underscores this point: "the term record means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph", 5 U.S.C. §552a(a)(4).

casually refers to these cases, and the statute, as exempting "'tax return information'", (Brief for Petitioners 20), as if to suggest that this was as particular a description as the statute set forth. In fact, Section 6103(b)(2) of the Internal Revenue Code sets forth in excruciating detail a definition of the term "'return information'", *King v. I.R.S.*, *supra*, at 490. It was this "highly inclusive definition", *Id.* at 491, which the courts in question found to be "drawn narrowly enough to avoid the evils of unfettered agency discretion with which Congress was trying to deal when it amended Exemption 3". *Chamberlain v. Kurtz*, *supra*, at 839. Similarly, "applications for patents" and "information concerning the same", 35 U.S.C. §122, upheld as an Exemption 3 statute in *Irons & Sears v. Dann*, 606 F.2d 1215 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980), is considerably more precise than "the kind of blanket authorization to keep secret", *Id.* at 1221, which is embodied in Privacy Act Exemption (j)(2). The same is true of each other statute cited by the Government as examples. Thus, with reference to Section 222(f) of the Immigration and Nationality Act, 8 U.S.C. §1202(f), the Third Circuit found the description of "'records of the Department of State and diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States'" to be "'sufficiently delimited to fit within the statutory language'". *DeLaurentis v. Haig*, *supra*, 686 F.2d at 193. The hallmark of each of these statutes is the precision of their focus, as contrasted with the broad sweep of subsection (j)(2).

5. To the contrary, (j)(2) is more than reminiscent of the statute upheld by this Court in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975). The statute at issue there permitted withholding of "information contained in any application, report or document" filed pursuant to a whole gamut of laws governing the federal aviation program or obtained by the CAB or FAA. It was Congress' "'dissatisfaction with the broad administrative discretion in the withholding of documents under FOIA'",

DeLaurentis v. Haig, 686 F.2d at 193, as interpreted by this Court in *Robertson*, that directly led to the amendment of Exemption 3 in 1976 into its present form. *CPSC v. GTE Sylvania*, 447 U.S. 102, 121 n18 (1980); *Iron & Sears v. Dann*, 606 F.2d at 1219-1220. Here, as in *Administrator FAA v. Robertson*, *supra*, the "potential for wide spread administrative discretion over the withholding of a vast category of documents", *DeLaurentis v. Haig*, *supra*, at 193-194, is not only present, but has been realized in the facts of this case.

6. Privacy Act Exemption (j)(2) is so lacking in specificity that the decision as to which documents are to be withheld must, of necessity, be made by the agency holding or generating the records. Thus, the material exempted is not exempted by the "statute" itself, as required by Exemption 3. This is not some mere technicality, but, rather, goes to the heart of the philosophy underlying Exemption 3. Even though subsection (B) of that exemption embraces statutes that leave some room for administrative discretion, Congress clearly intended that the legislative branch, rather than the executive, make the "basic policy decisions on governmental secrecy". *American Jewish Congress v. Kreps*, 574 F.2d 624, 628-630 (D.C. Cir. 1978). The crucial distinction is

> . . . between statutes that in some manner *told* the official what to do about disclosure and those that did not significantly inform his discretion in that regard. (emphasis in original).

By its broad exemption for entire "systems of records", (j)(2) simply leaves the decision as to what is to be excluded to the virtually unguided discretion of the agency.

7. Perhaps the lower court decision closest in point is *Church of Scientology v. U.S. Postal Service*, 633 F.2d 1327 (9th Cir. 1980), where 5 U.S.C. §410(c)(6) was held not to be an FOIA Exemption 3 statute. That provision purported to exempt "investigatory files, whether or not considered closed, compiled for law enforcement purposes. . . ." The Postal Service argued unsuccessfully that the statute adequately described "particular types of matters to be withheld". The Court opted for the approach set out in *American Jewish Congress v. Kreps, supra*, 574 F.2d at 628-629, where the Court stated:

> Nondisclosure is countenanced by Subsection (B) if, but only if, the enactment is the product of congressional appreciation of the dangers inherent in airing particular data and incorporates a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw.

With respect to the issue of legislative intent, the Court found that to permit an exemption for "investigatory files" would be to erect precisely the type of barrier which Congress sought to avoid when it amended FOIA Exemption 7 in 1974. 633 F.2d at 1331-1332. As originally written Exemption 7 permitted non-disclosure of "investigatory files compiled for law enforcement purposes. . . ." In *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214 (1978), this Court reviewed the legislative history of the 1974 amendment, and concluded (437 U.S. at 230) that,

> . . . the thrust of Congressional concern in its amendment of Exemption 7 was to make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file.

Congress was concerned that investigative files not continue to be exempted when an investigation was over as a result of the

passage of time. 437 U.S. at 231-232; *Church of Scientology v. U.S. Postal Service, supra*, 633 F.2d at 1332. Thus, the Ninth Circuit found no legislative intent justifying exemption of Postal Service investigatory files and found, as well, that the statute allowed too much agency discretion, notwithstanding the purported narrowing of the category to such files "compiled for law enforcement purposes". 633 F.2d at 1333.

It is difficult to see in what meaningful way Privacy Act (j)(2), covering "information compiled for the purpose of a criminal investigation" or "reports . . . compiled at any stage of the process of enforcement of the criminal laws . . .", differs from the original version of Exemption 7, ("investigatory files compiled for law enforcement purposes") explicitly disapproved by Congress in 1974. Indeed, they are virtually indistinguishable.

8. Furthermore, to grant a blanket exemption to such "systems of records" completely frustrates the FOIA policy "requiring the disclosure of unexempt portions of otherwise exempt files". *Department of Air Force v. Rose*, 425 U.S. 352, 374 (1975). As this Court noted there, the FOIA was expressly amended in 1974 to provide for disclosure of "any reasonably segregable portion" of records which are otherwise exempt, 5 U.S.C. §552(b), and for de novo judicial review, in camera, in order to carry out that purpose. 5 U.S.C. §552(a)(4)(B). *See United States v. Weber Aircraft Corp.*, ___ U.S. ___, 79 L. Ed. 2d 814, 823, n.17, 104 S. Ct. ___ (1984); *Founding Church of Scientology v. Bell*, 603 F.2d 945, 950 (D.C. Cir. 1929). That purpose would be clearly frustrated by the type of blanket exemption created by Section (j)(2) of the Privacy Act.

Indeed, if respondent's position herein were accepted, it would still remain for this matter to be remanded to the District Court where the Government could then invoke any applicable FOIA exemptions and respondent would be entitled to admittedly non-

exempt portions of his records and judicial review as to those sections withheld. In respondent's case, it is difficult to imagine what legitimate governmental interest could not be more than adequately protected by FOIA Exemption (7), covering "investigatory records compiled for law enforcement purposes", to the extent that such records touch upon virtually all sensitive matters.

CONCLUSION

The judgment of the Court of Appeals should be affirmed and the case remanded to the District Court for determination as to whether respondent is entitled to any of his records in light of the specific exemptions of the FOIA.

Respectfully submitted,

HARVEY WEISSBARD
Attorney for Respondent

AMICUS CURIAE

BRIEF

No. 83-1045

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES DEPARTMENT OF JUSTICE, WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES AND WILLIAM H. WEBSTER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION,

PETITIONERS,

v.

ANTHONY PROVENZANO,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Section (j)(2) of the Privacy Act relieves the Government of its obligation under the Freedom of Information Act to make particularized assessments of the extent to which disclosure of specific criminal law enforcement records would cause a harm identified by Congress in the Freedom of Information Act as a ground for withholding.

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October Term, 1983

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RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

Interest of the Amicus Curiae[1]

The American Bar Association is an organization of almost 300,000 members of the bar, including lawyers in private practice and in Government. The stated purposes of the organization are, *inter alia*, "to advance the science of jurisprudence" and "to promote throughout the nation the

[1] This brief is filed with the consent of the parties. Letters of consent from the Solicitor General and counsel for the respondent have been filed with the Clerk.

administration of justice." ABA Const., art. I, § 1.2. Within that broad mandate, the ABA has a special interest in ensuring that the practices of Government agencies regarding the dissemination of information reflect a rational and balanced policy of disclosure that gives proper deference to governmental interests while providing maximum appropriate disclosure to those who may be affected by the Government's use of that information.

Through its Section of Administrative Law (composed of lawyers with particular expertise and interest in this area), the ABA has been involved in the study of disclosure statutes including the Freedom of Information Act ("FOIA") and the Privacy Act. Representatives of the ABA participated at the earliest stages of the legislative process leading to enactment of FOIA, and strongly supported legislation providing greater public access to governmental records. Again in 1973 and 1974, when Congress was considering bills to expand public disclosure under FOIA, the ABA actively supported enactment of such legislation.

The House of Delegates of the ABA adopted at its mid-winter meeting this year a resolution urging Federal agencies to adhere to guidelines and regulations assuring that the Privacy Act is not administered to diminish an individual's access under FOIA to records pertaining to him. In that resolution, the House of Delegates urged

> the Department of Justice, the Office of Management and Budget, and other Federal agencies to adhere to regulations and guidelines which provide that, to the extent a person seeks access to individually identifiable records concerning himself, he shall receive, in addition to records he is entitled to receive under the Privacy Act, access to all records required to be disclosed under the Freedom of Information Act.

This case raises important issues concerning the scope of information available to individuals who are the subjects of Government files—issues that implicate the ABA's long-standing involvement in the balanced and appropriate disclosure of Government records.

Statement

A. *Statutory Framework*

This case involves the interrelationship of two federal statutes: FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a.

1. FOIA is a disclosure statute mandating release of all Government records, excepting only records or portions of records covered by specific exemptions. An agency which possesses nonexempt records "shall," upon request, "make the records promptly available to any person." 5 U.S.C. § 552(a)(3). Under FOIA "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." *Id.* § 552(b).

FOIA contains nine exemptions. One of them, Exemption 7, includes detailed criteria designed by Congress to govern the extent to which records compiled for law enforcement purposes may be withheld from public scrutiny. 5 U.S.C. § 552(b)(7). Exemption 7 permits agencies to withhold

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a

> lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel . . . .

Another FOIA exemption, Exemption 3, exempts from disclosure under FOIA matters that are

> specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . .

5 U.S.C. § 552(b)(3) (emphasis added).

2. The Privacy Act is not a disclosure statute. It is designed principally to control the Government's collection, use, and dissemination of personal information. It limits the kinds of personal information that an agency may collect, 5 U.S.C. § 552a(e)(1) and (7); prescribes preferred sources and required procedures for the collection of personal information, § 552a(e)(2) and (3); limits inter-agency sharing of personal information, § 552a(b)(7); and imposes an obligation on agencies to make reasonable efforts to assure that their personal records are accurate, complete, timely, and relevant to agency purposes, § 552a(e)(5).

Enforcement of the Government's obligations under the Privacy Act is placed first and foremost in the hands of those who are apt to be most diligent in enforcement: the individuals who are the subjects of Government records. Thus, under the Act, individual subjects of Government records are entitled to know of the existence and description of all Government record systems, § 552a(e)(4); they have a right of access to agency records pertaining to themselves, § 552a(d)(1); they have a right to request that their records be corrected or otherwise amended, § 552a(d)(2); they are entitled to advance

notice and an accounting of certain agency disclosures of their records, § 552a(c)(1)-(3) and (e)(8); and they have a right to judicial review of agency refusals of their requests for access to or amendments of their records, § 552a(g)(1).

Provisions of the Privacy Act permit agencies to exempt certain systems of records by regulation from some but not all of the requirements of that Act. Section (j) of the Act, "General Exemptions," provides that

> [t]he head of any agency may promulgate rules . . . to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is— (1) maintained by the Central Intelligence Agency; or (2) maintained by any agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws . . . , and which consists of [enumerated kinds of information or reports] . . . .

5 U.S.C. § 552a(j). Section (k) of the Act, "Specific Exemptions," authorizes agencies to exempt other systems of records from an even more limited subset of the requirements of the Act. See 5 U.S.C. § 552a(k). Both provisions expressly prohibit any agency from avoiding the requirements of Section (b) of the Act,[5] which states in pertinent part:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
>
> . . . .
>
> (2) required under section 552 of this title [*i.e.*, FOIA] . . . .

[5] Section (k), like Section (j), provides that an agency head may exempt systems of records from any part of the Privacy Act "except subsections[ ] (b) . . . ." 5 U.S.C. § 552a(k) (emphasis added).

B. *Prior Proceedings*

In April 1978, the respondent requested under authority of FOIA that the Criminal Division of the Department of Justice and the Federal Bureau of Investigation provide him copies of all of their records indexed under his name or containing his name. For more than two years, neither agency responded substantively to the respondent's request: both periodically informed him that his request had not been processed, and that no assurance could be given that it would soon be processed.

In December 1981, the respondent filed this action in the United States District Court for the District of New Jersey to compel release of the records he had requested. The Government moved for summary judgment on the ground that the requested records are exempt from disclosure under FOIA because they are contained in systems of records exempted from disclosure under the Privacy Act by virtue of regulations adopted under the authority of Section (j)(2) of the Privacy Act. The District Court granted the Government's motion. The Court of Appeals for the Third Circuit reversed and remanded the case to the District Court for a determination of the extent to which the requested records are exempt from disclosure under the specific provisions of FOIA itself.[5]

Summary of Argument

This case concerns the criteria a criminal justice agency must apply when assessing whether or not to disclose criminal justice records to the subject of those records. Specifically, the issue is whether Section (j)(2) of the Privacy Act is an exempting statute comprehended by Section (b)(3) of FOIA. If Section (j)(2) of the Privacy Act is a withholding statute within the compass of FOIA Exemption 3, then criminal justice agencies need not assess whether the disclosure of specific records

[5] The instant case has been consolidated in this Court with *Shapiro and Waxey v. D.E.A.*, No. 83-1870, on writ of certiorari to the Court of Appeals for the Seventh Circuit, which presents the same question for review.

would cause one or more of the harms identified by Congress in FOIA Exemption 7 as grounds for nondisclosure. On the other hand, if Section (j)(2) is not within the compass of FOIA Exemption 3, then criminal justice agencies may withhold only those records or portions of records the disclosure of which would cause one or more of the enumerated harms identified by Congress as grounds for nondisclosure.

Thus this case will not necessarily determine the extent to which the respondent will receive the records he has requested; it concerns only the procedure that the Criminal Division of the Department of Justice and the Federal Bureau of Investigation must follow in processing his request.

The language and the legislative history of the Privacy Act as a whole, and of Section (j)(2) in particular, lead to the conclusion that Section (j)(2) is not a withholding statute within the compass of FOIA Exemption 3. The language of the pertinent statutory provisions—Section (j)(2) of the Privacy Act and section (b)(3) of FOIA—would, if read literally, exclude (j)(2) from the reach of (b)(3): (b)(3) reaches only statutes that exempt matters from disclosure *to the public*, whereas (j)(2) does not by its terms permit an agency to withhold any matter from the public generally. Further, (j)(2) does not by its terms permit an agency to withhold any record even from the subject of the record in response to a request grounded on any right other than the access provisions of the Privacy Act itself. Thus the language chosen by Congress to express its will does not manifest a congressional intent to bar disclosure under FOIA of records that may be exempted from disclosure under the Privacy Act.

Statutory language need not control statutory construction if there is strong evidence of a contrary congressional intent. Here there is no indication that Congress intended Section (j)(2) to sweep more broadly than its language dictates. Instead, there is ample evidence in the legislative history of the Privacy Act that Congress intended (j)(2) to curtail only cer-

tain of the new access, accounting, notice, correction and other rights conferred by the Privacy Act itself. Congressional committee reports and debates concerning proposed privacy bills demonstrate quite clearly that Congress enacted (j)(2) to guard against certain potentially troublesome effects of general privacy legislation on criminal law enforcement efforts. Those sources of congressional intent reveal that Section (j)(2) was intended to avoid those potential problems by permitting criminal justice agencies to exempt their record systems from certain requirements of the Privacy Act, thereby preserving the status quo with respect to those matters unless and until Congress determined to act on proposed legislation dealing specifically with privacy in the context of criminal justice records.

The Executive branch itself read the language and legislative history of Section (j)(2) in just this way for more than six years immediately following enactment of the statute, reversing its position only recently during the course of litigation. The Government was right at first and wrong to change. The language of Section (j)(2) was carefully chosen to avoid curtailing access rights under FOIA; it embodies the limits on its reach that were intended by Congress.

Argument

I. By Its Terms, Section (j)(2) of the Privacy Act Does Not Count Within the Compass of FOIA Exemption 3.

By its terms, Section (j)(2) is not a withholding statute within the meaning of FOIA Exemption 3. Section (j)(2) specifically provides that agency heads may promulgate rules exempting systems of criminal records from the operation of certain provisions of "this section," *i.e.*, the Privacy Act. Had Congress intended to include FOIA within the reach of (j)(2), it would have referred to "this title," as it did elsewhere within the Privacy Act. *See Greentree v. U.S. Customs Service*, 674 F.2d 74, 79 (D.C. Cir. 1982); *Porter v. Dept. of Justice*, 717

F.2d 787, 797 (3d Cir. 1983). When Congress intended to refer to FOIA in the Privacy Act, Congress did so expressly. *See* 5 U.S.C. §§ 552a(b)(2) and (q).

The Government asserts that Section (j)(2) is a withholding statute despite its express limitation to provisions of the Privacy Act itself because FOIA Exemption 3 comprehends statutes that do not include a specific reference to FOIA. Government's Brief at 21. That argument is a non sequitur. The reason (j)(2) is not a withholding statute is not that it fails to mention FOIA, but that Congress selected language which excludes FOIA from its reach.

A statute comes within the compass of FOIA Exemption 3 only if it either "(A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue," 5 U.S.C. § 552(b)(3)(A), or "(B) establishes particular criteria for withholding or refers to particular types of matters to be withheld," 5 U.S.C. § 552(b)(3)(B). In either case, the statute must be "the product of congressional appreciation of the dangers inherent in airing particular data." *American Jewish Congress v. Kreps*, 574 F.2d 624, 628 (D.C. Cir. 1978).

A statute might be the product of such a congressional concern for secrecy whether or not it refers expressly to FOIA. The determining factor is not the presence or absence of a reference to FOIA; rather, the determining factor is whether the statute manifests either in its language or in its legislative history a determination by Congress that certain matters be kept from public scrutiny. Thus, for example, Section 122 of the Patent Act[*] has been held to be within the scope of FOIA Exemption 3 because it "affirmatively requires non-disclosure . . . of rather particular sorts of material." *Irons & Sears v. Dann*, 606 F.2d 1215, 1221 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). *See also Lee Pharmaceuticals v. Kreps*, 577 F.2d 610 (9th Cir. 1978). Similarly, Section

[*] "Applications for patents *shall* be kept in confidence . . . " 35 U.S.C. § 122 (emphasis added).

...withdraw[]" and 403g* of Title 50 have been held to be within the scope of FOIA Exemption 3 because both statutes were plainly intended to bar public disclosure generally, and because the House Report on the 1978 amendments to FOIA Exemption 3 *expressly* refers to Section 403(d)(3) as a withholding statute. *See National Commission on Law Enforcement & Social Justice* v. *C.I.A.*, 576 F.2d 1373, 1378 (9th Cir. 1978) (citing H.R. Rep. No. 94-880, Part II, 94th Cong., 2d Sess., 14-15, n.2, U.S. Code Cong. & Admin. News, p. 2233). *See also Founding Church of Scientology* v. *Nat. Sec. Agcy.*, 610 F.2d 824, 827 (D.C. Cir. 1979) (50 U.S.C. § 402, which provides that "nothing in this Act or any other law . . . shall be construed to require the disclosure [of specified information]," is a (b)(3) withholding statute); *King* v. *I.R.S.*, 688 F.2d 488 (7th Cir. 1982) and *Chamberlain* v. *Kurtz*, 589 F.2d 827 (5th Cir. 1979) (26 U.S.C. § 6103, which provides that as a "general rule" tax returns and tax return information "*shall be confidential*" and that no official with access to tax files "shall disclose any return or return information obtained by him," is a (b)(3) statute); *Medina-Hincapie* v. *Dept. of State*, 700 F.2d 737 (D.C. Cir. 1983) and *DeLaurentis* v. *Haig*, 686 F.2d 192 (3d Cir. 1982) (§ 222(f) of the Immigration and Nationality Act, 8 U.S.C. § 1202(f), which provides that U.S. Government records pertaining to the issuance or refusal of visas or permits to enter the U.S. "*shall be considered confidential*," is a (b)(3) statute).

As these cases show, FOIA Exemption 3 encompasses only those statutes that manifest a congressional concern for *confidentiality*—statutes intended by Congress to keep matters

* "The Director of Central Intelligence *shall be responsible for protecting* intelligence sources from *unauthorized disclosure* . . . ." 50 U.S.C. § 403(d)(3) (emphasis added).

* "In order further to implement the proviso of Section 403(d)(3) of this title [that] the Director of Central Intelligence *shall be responsible for protecting* intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from *the provisions of any other law* requiring disclosure of such information. 50 U.S.C. § 403g (emphasis added).

from the public. Section (j)(2) of the Privacy Act is not the affirmative, general limitation on public disclosure required of a (b)(3) statute. First, it limits only disclosure under the Privacy Act. Second, it limits only disclosure to specified individuals, not to the public at large. Indeed, it expressly *denies* an agency authority to avoid the requirements of Section (b) of the Privacy Act, and subsection (b)(2) of the Act expressly preserves access rights under FOIA.

Section (j)(2) has neither the purpose nor the effect of keeping any matter secret. It serves an entirely different goal, which is apparent in its legislative history.

II. The Legislative History of Section (j)(2) Demonstrates That Congress Intended That Provision To Limit Only the Incremental Rights Created by the Privacy Act Itself.

A. *Congress Intended the Privacy Act To Supplement, Not Supplant, the Government's Duty Under FOIA To Disclose Agency Records to the Subjects of Those Records.*

Though the House and Senate originally passed different versions of privacy legislation,† both houses of Congress agreed that privacy legislation should *not* in any way displace or abridge an individual's access rights under FOIA or other

† The Senate bill, S. 3418, was introduced by Senator Ervin, amended and then favorably reported by the Senate Committee on Government Operations, amended on the floor of the Senate, and then passed. *See* S. 3418, 93d Cong., 2d Sess. (May 1, 1974), Legislative History of the Privacy Act of 1974, 9-20 (1976) (*referenced hereinafter as* "Privacy Act Source Book"); S. 3418, 93d Cong., 2d Sess. (September 20, 1974), Privacy Act Source Book at 97-150; S. Rep. No. 1183, 93d Cong., 2d Sess. (1974), Privacy Act Source Book at 151-238; 120 Cong. Rec. S 36902-36920 (daily ed. Nov. 21, 1974), Privacy Act Source Book at 763-838. The House bill, H.R. 16373, was introduced by Congressman Moorhead, amended and then favorably reported by the House Committee on Government Operations, amended on the floor of the House, and then passed. *see* H.R. 16373, 93d Cong., 2d Sess. (August 21, 1974), Privacy Act Source Book at 239-257; H.R. 16373, 93d Cong., 2d Sess.

legislation. The report of the Senate Committee on Government Operations was unequivocal on the point:

> Subsection 201(d) [*i.e.*, the Senate version of the proposed privacy bill which was later enacted as § 552a(d) of the Privacy Act] states the basic right of the individual to inspect and correct the personal information which the Government has on record about that person. *Its provisions are minimum standards and are not intended to preempt or preclude laws and regulations providing even stronger protections for such rights.*

S. Rep. No. 1183, *supra*, at 50, Privacy Act Source Book at 212 (emphasis added). Indeed, § 205(b) of the Senate bill (the substance of which was included in the Privacy Act as § 552a(b)(2)), contained the provision that "nothing in this Act shall be construed to permit the withholding of any personal information which is otherwise required to be disclosed by law or any regulation thereunder." Privacy Act Source Book at 365. The joint staff analysis of the compromise bill noted that Section 205(b) "was intended as specific recognition of the need to permit disclosure under the Freedom of Information Act." Joint Staff of House and Senate Committees on Government Operations, 93d Cong., 2d Sess., Analysis of House and Senate Compromise Amendments to the Federal Privacy Act (1974) (referenced hereinafter as "Joint Staff Analysis"), Privacy Act Source Book at 861.

(Oct. 2, 1974), Privacy Act Source Book at 258-283; H.R. Rep. No. 1416, 93d Cong., 2d Sess. (1974), Privacy Act Source Book at 284-333; 120 Cong. Rec. H 36943-36980 (daily ed. Nov. 20, 1974), Privacy Act Source Book at 880-884. During the 1974 Thanksgiving recess, the staffs of the House and Senate Committees on Government Operations negotiated a compromise bill that subsequently passed both houses and was signed by President Ford. See 120 Cong. Rec. S 40405-40413 (daily ed. Dec. 17, 1974), Privacy Act Source Book at 839-877; 120 Cong. Rec. H 40881-40886 (daily ed. Dec. 18, 1974), Privacy Act Source Book at 985-1001.

The view of the House was no different. The Report of the House Committee on Government Operations noted only one respect in which the original House Bill was intended by the Committee to curtail access rights under FOIA, and that was with regard to

> [FOIA Exemption 6], which states that the provisions regarding disclosure of information to the public shall not apply to material "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

H. Rep. No. 1416, *supra*, at 13, Privacy Act Source Book at 309 (emphasis added). Neither the House Committee Report nor any of the congressmen who debated the bill on the floor even remotely suggested that the bill would curtail an individual's access under FOIA *to his own records*. On the contrary, Congressman Moorhead expressed the consensus of the House when he said during debates over the scope of Privacy Act exemptions from disclosure that "[t]he committee does not feel it should repeal other statutes by implication." 120 Cong. Rec. H 36961 (daily ed. Nov. 20, 1974), Privacy Act Source Book at 942.

The express congressional intent of the final version of the Act was to preserve all rights of access under FOIA. The joint staff analysis of the compromise bill states:

> The compromise amendment [(b)(2)] would add an additional condition of disclosure to the House Bill which prohibits disclosure without written request of an individual unless disclosure of the record would be pursuant to Section 552 of the Freedom of Information Act. *The compromise is designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information under that section.*

Joint Staff Analysis, Privacy Act Source Book at 861 (emphasis added).

Agencies and individuals prominently involved in the passage and implementation of the Privacy Act and FOIA consistently expressed the view that the Privacy Act preserved all existing rights of access under FOIA. President Ford stated when signing the act that "the provisions for disclosure of personal information by agencies make no substantive change in the current law." STATEMENT BY THE PRESIDENT UPON SIGNING THE PRIVACY ACT OF 1974, 1 PUB. PAPERS (FORD) 1 (Jan. 1, 1975), Privacy Act Source Book at 1001. The Office of Management and Budget, charged with developing guidelines and regulations to implement the Act,* in 1975 sought to assure that "individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than that they had prior to its enactment." 40 Fed. Reg. 56742-43 (December 4, 1975).* The Department of Justice itself argued in support of the OMB interpretation before the District Court in *Greentree* v. *U.S. Customs Service*, 515 F.Supp. 1145 (D.D.C. 1981), *rev'd* 674 F.2d 74 (D.C. Cir. 1982). *See* 674 F.2d at 75. The Privacy Protection Study Commission, established by section 5 of the Privacy Act to study the functioning of the Act, adopted the same view, as did several committees of Congress and individual Senators and Representatives. *See Greentree* v. *U.S. Customs service*, *supra*, 674 F.2d at 85-85, n. 28. Legal scholars concur. *See* 674 F.2d at 87, n. 29.

B. *The Legislative History of Section (j)(2) Demonstrates That Congress Intended That Provision to Preserve the Status Quo Under FOIA.*

The Privacy Act imposed new duties of enhanced disclosure, accuracy, fairness, relevance, timeliness, notice, accounting and correction on government agencies. These new duties had

* Privacy Act, Pub. L. No. 93-587, § 6, 88 Stat. 1908, 1909, Privacy Act Source Book at 514.

* Now amended to reflect the current position of the Executive Branch. See 49 Fed. Reg. 12338-12341 (1984).

the potential to cause serious, new problems for criminal law enforcement agencies, which could not be solved within the confines of general privacy legislation. Section (j)(2) of the Privacy Act was intented to avoid these potential problems by permitting criminal justice agencies to exempt their record systems from the potentially troublesome requirements of the Privacy Act, thereby preserving the status quo unless and until Congress decided to act on proposed legislation dealing specifically with privacy in the context of criminal justice records. The report of the House Committee on Government Operations is clear on the point:

> Criminal justice records are so different in use from other kinds of records that their disclosure should be governed by separate legislation. . . .

H.R. Rep. No. 1416, *supra*, at 18, Privacy Act Source Book at 311. The Report of the Senate Committee on Government Operations is equally clear:

> [T]he Committee decided that, to the extent feasible, S. 3418 should apply to law enforcement files but that such application should not be inconsistent with the two major criminal justice privacy bills, introduced early this year, S. 2963 by Senator Ervin and S. 2964 by Senator Hruska on behalf of the Administration.
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> . . .
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> Obviously, these general provisions [in S. 3418] on law enforcement records are not entirely adequate. The two criminal justice privacy bills address this subject in considerable detail and are the result of at least two years of careful study and revision by the Subcommittee on Constitutional Rights and the Justice Department. However, *the Committee feels that general privacy legislation must assure subjects of law enforcement files these minimal rights until such time as the more comprehensive criminal justice legislation is passed.*

S. Rep. No. 1183, *supra*, at 22-23; Privacy Act Source Book at 173-74 (emphasis added).[10]

Remarks during congressional debate on the law enforcement exemption from the privacy bills echo the committee reports and confirm that Congress intended that exemption to preserve existing access rights—governed principally by the recently amended FOIA Exemption 7—until comprehensive criminal justice legislation was passed or abandoned. *See, e.g.*, 120 Cong. Rec. S. 39908-39907; Privacy Act Source Book at 909-13 (colloquy between Senators Brooke and Percy); 120 Cong. Rec. H. 39646; Privacy Act Source Book at 888 (remarks of Congressman Erlenborn: "We generally exempt from the provisions of this bill the law enforcement proceedings, systems for the criminal justice system, and other committees of Congress will be turning and have already turned their attention to this criminal justice field") (emphasis added); 120 Cong. Rec. H. 39646; Privacy Act Source Book at 900 (remarks of Congressman Dennis); 120 Cong. Rec. H. 39651; Privacy Act Source Book at 903 (remarks of Congressman Koch); and 120 Cong. Rec. H. 39969; Privacy Act Source Book at 904 (further remarks of Congressman Koch).

By limiting the reach of (j)(2) to the incremental rights created by the Privacy Act, Congress reaffirmed the decision it had made just a few weeks earlier—when it overrode President Ford's veto of amendments limiting the scope of FOIA Exemption 7—to require the FBI and other law enforcement agencies to make particularized assessments, subject to judicial review, of the extent to which disclosure of specific law enforcement records would cause a harm identified by Congress as a ground for withholding.

[10] Section 6 of the criminal justice privacy bills reviewed in the Senate report was subsequently enacted. FOIA Exemption 7, as amended in 1974, continues to govern public access to law enforcement records.

Congress passed extensive, limiting amendments to FOIA Exemption 7 just a few weeks before it passed the Privacy Act. *See Greentree v. U.S. Customs Service*, *supra*, 674 F.2d at 83-84. President Ford vetoed those amendments, and Congress was debating the Privacy Act while it was preparing to override his veto. *See id.*; 120 Cong. Rec. H. 39645 (daily ed. Nov. 20, 1974); Privacy Act Source Book at 887 (statements of Congressman Erlenborn: "I think it is rather fitting that this [Privacy] bill comes to the floor on the same day that we considered a motion to override and have overridden the President's veto of the Freedom of Information Act").

FOIA Exemption 7 governs the disclosure of investigatory records compiled for law enforcement purposes, and thus overlaps substantially the materials covered by Privacy Act exemption (j)(2). As limited by the 1974 amendments, FOIA exemption 7 permits agencies to withhold

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel . . . .

5 U.S.C. § 552(b)(7).

During the debate on whether to override the President's veto, the Senate considered and rejected President Ford's objection that the amendment would require a separate time-

consuming review "for each paragraph of each document requested." 120 Cong. Rec. H. 36243 (daily ed. Nov. 18, 1974), Legislative History of Freedom of Information Act and Amendments of 1974 (1975) at 398 (referenced hereinafter as "FOIA Source Book"). Senator Hart, sponsor of the amendment, pointed out that the President's message

> singles out investigatory files for exemption from the amendment's command that 'any reasonably segregable portion of a record shall be provided—after deletion of the portions which are exempt.' The Presidential substitute [proposed legislation] allows the agency to classify a file as a unit without close analysis, alleging that the time limits and staff resources are inadequate for such intensive analysis. This would allow an agency to withhold all the records in a file if any portion of it runs afoul of the safeguards above.

120 Cong. Rec. S. 36871 (daily ed. Nov. 21, 1974), FOIA Source Book at 451. The intended effect of the amendment was precisely to require disclosure of "any reasonably segregable portion of a record," as is further shown by remarks of Senator Hruska, who, speaking in support of sustaining the President's veto, described the effect of the FOIA amendments as follows:

> The enrolled bill requires the FBI and other law enforcement agencies to respond to any person's request for investigative information by sifting through pages and pages of files within strict limits. If the agency believes that information must be withheld from the public, it must prove to a court line-by-line that disclosure would disclose the identity of a source or confidential information furnished by him, would impair the investigation or would constitute an invasion of personal privacy. . . The magnitude of such a task and the standards of harm that are defined in the Amendment create serious doubt as to whether such a provision is workable aside from its questionable wisdom.

120 Cong. Rec. S. 36873 (daily ed. Nov. 21, 1974), FOIA Source Book at 456-457.

Following these debates, both houses of Congress voted to override President Ford's veto, *while at the same time* preparing to enact the Privacy Act.

Section (j)(2) of the Privacy Act permits criminal justice agencies to avoid the enhanced disclosure and correction requirements of the Act (§ 552a(d)); the obligation to maintain only necessary personal information about individuals (§ 552a(e)(1)); the obligation to collect information about an individual directly from the individual himself (§ 552a(e)(2)); the obligation to inform sources of information of the agencies' authority for collecting information, their purpose in collecting the information, and the consequences of failure to provide requested information (§ 552a(e)(3)); the obligation to retain only reasonably accurate information (§ 552a(e)(5)); and the obligation to notify the subjects of records of certain disclosures of their records (§ 552(e)(8)). The contours of Section (j)(2) of the Privacy Act were shaped by congressional concern over the impact that these other provisions of the Privacy Act might have on criminal law enforcement efforts. Congress was *not* concerned that there was too much public disclosure of law enforcement records under FOIA, or that compliance with the specificity requirements of FOIA was too burdensome on law enforcement agencies; those matters had been addressed and resolved just a few weeks earlier in the amendments to FOIA Exemption 7.

Thus the legislative history of the Privacy Act confirms that Congress intended Section (j)(2) to curtail only certain of the rights conferred by the Privacy Act itself. Even if the language of Section (j)(2) had not so clearly limited the reach of that section, the legislative history would suffice to show that Congress did *not* intend Section (j)(2) to curtail access rights conferred by FOIA.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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MOTION

(8)

Nos. 83-1045 and 83-5878

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.
PETITIONERS

v.

ANTHONY PROVENZANO

ALFRED B. SHAPIRO AND GREGORY J. WENTZ,
PETITIONERS

v.

DRUG ENFORCEMENT ADMINISTRATION

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURTS OF APPEALS FOR
THE THIRD AND SEVENTH CIRCUITS

MOTION TO VACATE

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TABLE OF AUTHORITIES

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The Solicitor General, on behalf of the petitioners in No. 83-1045 and the respondent in No. 83-5878, moves that the judgments of the courts of appeals be vacated and the cases remanded for further consideration in light of Section 2(c) of Public Law No. 98-477.

1. These cases, which were consolidated for purposes of oral argument, present the question whether Exemption (j)(2) of the Privacy Act of 1974, 5 U.S.C. 552a(j)(2), is a

withholding statute within the scope of Exemption 3 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3), and therefore prohibits an individual from obtaining disclosure of his agency records under the FOIA when access to those records is barred by the Privacy Act. On October 15, 1984, the President signed into law the Central Intelligence Agency Information Act, Public Law No. 98-477, Section 2(c) of which amends the Privacy Act by adding the following provision:

> No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

Under this new provision, it is clear that none of the Privacy Act exemptions, including Exemption (j)(2), may be invoked to bar disclosure of any record sought pursuant to the FOIA.

This new legislation plainly renders the question presented in these cases moot. The issue decided by the courts of appeals—whether, under the law as it existed prior to the recent amendment, the Privacy Act exemptions qualified as FOIA Exemption 3 withholding statutes—is no longer a "live" issue in these cases because, however the Court were to decide that issue, its decision would not affect the rights of the parties before it. These FOIA requests must be judged under the law now in effect. Accordingly, there is no case or controversy concerning the proper interpretation of prior law, and this Court lacks Article III jurisdiction to decide that issue. See, *e.g.*, *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971); *Powell* v. *McCormack*, 395 U.S. 486, 496 & n.7 (1969).*

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*Petitioners Shapiro and Wentz have filed a motion for summary reversal in No. 83-5878, arguing that Congress's recent action in amending the Privacy Act merely confirms that they were correct in their interpretation of the relationship between the Privacy Act and the FOIA under pre-existing law. This motion for summary reversal is without merit for a number of reasons. First, it is well settled that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 9 (citations omitted); See *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 165 n.27 (1983); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117-118 & n.13 (1980); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979). At all events, because the prior status of the law is entirely academic in light of Public Law No. 98-477, any decision by this Court addressing petitioners' contention would necessarily constitute an advisory opinion, which is barred by Article III. Petitioners cite no authority in support of their peculiar suggestion.

2. Despite the mootness of the question presented, the cases themselves are very much alive, since the nongovernment parties still seek access to their agency records under the FOIA and the government, after processing those records, may still assert that the records, or parts thereof, are exempt from disclosure under one or more of the FOIA exemptions. Because this Court has previously determined that the issue decided by the courts of appeals warranted further review, and because the effect of the enactment of legislation mooting that issue is to eliminate the occasion for that review, we believe that the appropriate disposition would be for the Court to vacate the judgments of the courts of appeals and remand the cases for further proceedings in light of the intervening change in the law. The Court has consistently followed this course in similar circumstances. See, *e.g.*, *United States Nuclear Regulatory Comm'n* v. *Sholly*, 459 U.S. 1194 (1983); *Bureau of Economic Analysis* v. *Long*, 454 U.S. 934 (1981); *IRS* v. *Fruehauf Corp.*, 429 U.S. 1085 (1977). Cf. *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

It is therefore respectfully submitted that the judgments of the courts of appeals should be vacated and the cases remanded for further consideration in light of Section 2(c) of Public Law No. 98-477.

REX E. LEE
Solicitor General

OCTOBER 1984

DOJ-1984-10

OPINION

SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF JUSTICE ET AL.
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ANTHONY PROVENZANO

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ALFRED B. SHAPIRO AND GREGORY J. WENTZ
83-5878 v.
DRUG ENFORCEMENT ADMINISTRATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 83-1045 AND 83-5878. Decided November 28, 1984

PER CURIAM.

These two cases, when they were filed here, presented the issue whether Exemption (j)(2) of the Privacy Act of 1974, 5 U. S. C. § 552a(j)(2), is a withholding statute within the third exemption of the Freedom of Information Act (FOIA), 5 U. S. C. § 552(b)(3). Because the Courts of Appeals below had decided the issue oppositely, 717 F. 2d 799, on rehearing, 722 F. 2d 36 (CA3 1983); 721 F. 2d 215 (CA7 1983), and the conflict deserved resolution, we granted certiorari in both cases and consolidated them for oral argument. —— U. S. —— (1984). See also *Greentree* v. *U. S. Customs Service*, 218 U. S. App. D. C. 231, 674 F. 2d 74 (1982).

The parties now advise us that on October 15, 1984, the President signed into law the Central Intelligence Information Act, Pub. L. 98-477, —— Stat. ——, which, by its § 2(c), amended the Privacy Act by adding the following provision:

> "No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title [FOIA]."

Thereafter, Anthony Provenzano, the respondent in No. 83–1045, and Alfred B. Shapiro and Gregory J. Wentz, the petitioners in No. 83–5879, moved for summary affirmance and summary reversal, respectively, of their judgments below. In his turn, the Solicitor General has filed a motion to vacate those judgments and to remand the cases to the respective Courts of Appeals.

The new legislation, as the parties agree, plainly renders moot the single issue with respect to which certiorari was granted in each of these cases. That issue is no longer alive because, however this Court were to decide the issue, our decision would not affect the rights of the parties. These requests for records now are to be judged under the law presently in effect. *See DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974); *North Carolina* v. *Rice*, 404 U.S 244, 246 (1971).

The mootness of the particular issue that was presented to us, however, does not mean that the cases themselves do not remain alive. Access to agency records is still sought by the individual litigants and, so far as we know, the Government may still assert that the records, or parts thereof, are exempt from disclosure under one or more of the FOIA exemptions. Such matters are better resolved by the courts below in the first instance.

Respondent Provenzano's motion for summary affirmance of the judgment in No. 83–1045 is therefore denied. The motion of petitioners Shapiro and Wentz for summary reversal of the judgment in No. 83–5879 is also denied. Instead, each of the judgments below is vacated, and the cases are remanded to the United States Courts of Appeals for the Third and Seventh Circuits, respectively, for such further proceedings as are indicated.

It is so ordered.

JUSTICE STEVENS, dissenting in No. 83–1045.

In view of the enactment of the Central Intelligence Information Act, Pub. L. 98–477, the petition for writ of certiorari in No. 83–1045 should be dismissed. In my opinion the

new Act does not provide a basis for vacating the judgment of the Court of Appeals in that case.